

1 UNITED STATES DISTRICT COURT
 2 WESTERN DISTRICT OF TEXAS
 3 WACO DIVISION

3 MATCH GROUP, LLC) Docket No. WA 18-CA-080 ADA
 4)
 4 vs.) Waco, Texas
 5)
 5 BUMBLE TRADING, INC.,)
 6 BUMBLE HOLDING, LTD.) June 7, 2019

7 TRANSCRIPT OF MARKMAN/MOTIONS HEARING
 8 BEFORE THE HONORABLE ALAN D. ALBRIGHT

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09:02:25 1 THE CLERK: The Court calls Waco case: 18-CV-80,
09:02:30 2 Match Group, LLC vs. Bumble Trading, Inc., for a Markman
09:02:32 3 hearing.

09:02:33 4 THE COURT: Thank you. You may be seated.

09:02:34 5 Counsel, if you would be so kind as to introduce
09:02:37 6 yourselves for the record first, and then, also, tell me,
09:02:40 7 on the record, who it is that you most anticipate speaking
09:02:44 8 on your -- on behalf of your.

09:02:48 9 MR. CALDWELL: Good morning, your Honor.

09:02:49 10 THE COURT: Good morning.

09:02:49 11 MR. CALDWELL: Brad Caldwell on behalf of Match
09:02:52 12 Group. And with me today that I anticipate will be
09:02:54 13 arguing is my colleague, John Summers. And the Court will
09:02:58 14 recognize Mr. John Palmer. And, your Honor, we also have
09:03:01 15 a couple of summer associates that are with us. So from
09:03:04 16 my firm, we have Chu Jo.

09:03:07 17 THE COURT: Where's Mr. Jo from?

09:03:10 18 MR. CALDWELL: Mr. Jo's University of Minnesota
09:03:13 19 and then, originally from China.

09:03:13 20 THE COURT: Very good.

09:03:15 21 MR. CALDWELL: And then, from Mr. Palmer's firm,
09:03:17 22 we have Zach Gloff from Cumberland University? That's
09:03:21 23 correct? And then, we have client representatives from
09:03:23 24 Match. And starting on my left back there -- or not the
09:03:25 25 far left, one over is Jared Sine and Jeanette Teckman and

09:03:29 1 Ben Setnick.

09:03:30 2 THE COURT: Very good. Thank you.

09:03:31 3 I always appreciate it when clients take the time
09:03:33 4 to be here. That means a great deal to the Court, very
09:03:37 5 helpful.

09:03:37 6 Yes, sir. Good morning.

09:03:39 7 MR. DRAYTON: Good morning, your Honor.

09:03:41 8 Joe Drayton from Cooley, LLP on behalf of Bumble.
09:03:46 9 And I have here with us Rose Whelan and Matt Caplan and
09:03:53 10 Naina Soni.

09:03:53 11 For the argument, I'll take a few terms on behalf
09:03:56 12 of Bumble at the Markman. And then, Rose Whelan will have
09:04:00 13 some terms on behalf of Bumble for Markman. And then,
09:04:03 14 Matt Caplan will argue the other motion for today.

09:04:05 15 THE COURT: Okay. And just so everyone knows, I
09:04:07 16 appreciate all the hard work you've put in this for the
09:04:10 17 clients who are here. The briefs were very good. I've
09:04:12 18 read everything that you all have submitted, pretty
09:04:15 19 carefully. I've already drafted the framework of a
09:04:19 20 construction order, so I have a pretty good idea of what
09:04:23 21 everyone is arguing.

09:04:24 22 I've also read pretty thoroughly the motion to --
09:04:30 23 I'm glad we could get that taken care of this morning, as
09:04:34 24 well. Have you all thought about who's going to go first
09:04:37 25 on whichever terms? I will tell you on at least the ones

09:04:42 1 where you are arguing that it's plain and ordinary meaning
09:04:45 2 and they're arguing it's indefinite, it doesn't make much
09:04:48 3 sense to me for you to go first.

09:04:51 4 And so, I know you think it's not indefinite, and
09:04:54 5 so, it'd probably be good for them to go first on those.
09:04:59 6 If you want to go first, or not, I'm happy to hear.

09:05:01 7 MR. CALDWELL: I was actually just going to
09:05:03 8 address the order thing. I think, first of all, both
09:05:05 9 parties, Mr. Drayton and I did talk about, we're just
09:05:08 10 happy to go however you see fit. And we also acknowledge
09:05:11 11 that you probably would want to hear from -- somewhat
09:05:14 12 deviating from plain meaning or something like that.

09:05:16 13 I wanted to announce just so that we don't kind
09:05:18 14 of head on down the wrong path that there is as of, I
09:05:22 15 don't know, maybe 8:57 this morning, some sort of
09:05:26 16 agreement on the "text area" indefiniteness term that it
09:05:29 17 is a text area, and then, that's plain meaning. And we
09:05:33 18 have an e-mail between us kind of establishing the basic
09:05:38 19 confines of --

09:05:39 20 THE COURT: Of what that means.

09:05:40 21 MR. CALDWELL: What that plain meaning is. And I
09:05:43 22 don't anticipate -- it doesn't look like there's really
09:05:46 23 any lingering dispute. There's not likely to be a
09:05:49 24 subsequent 02 Micro issue, or anything of that nature, but
09:05:50 25 we --

09:05:50 1 THE COURT: That's the one I spent the most time
09:05:53 2 thinking about.

09:05:53 3 MR. CALDWELL: I'm sure it was. That's why --
09:05:56 4 that's the reason I asked, right? So I just wanted you to
09:05:58 5 know that. Otherwise, we don't really care as to order.

09:06:00 6 There is one that's a little bit unique in that
09:06:04 7 on graphical representation, I think we would typically be
09:06:06 8 just saying plain meaning, but it's one that looks like
09:06:09 9 there will be an 02 Micro issue if we, the plaintiff,
09:06:13 10 don't actually propose a construction. So we sort of have
09:06:15 11 a construction there, but that doesn't mean I insist on
09:06:18 12 going first on that. And so.

09:06:21 13 THE COURT: You know, it's interesting you say
09:06:23 14 that because, you know, I joke a lot, I know, but I
09:06:26 15 actually had thought a lot about graphical representation
09:06:28 16 for that reason. I think I'm of the same like you are
09:06:34 17 that graphical representation seems to me to be graphical
09:06:38 18 representation. But the fact that there is -- the
09:06:44 19 defendants proffered and assuming he wants me to define
09:06:49 20 it -- they want me to define it, then I need to take that
09:06:52 21 up.

09:06:53 22 And I get why -- I get the point of the argument.
09:06:55 23 I get why the defendant is arguing that there needs to be
09:06:59 24 construction. But I will tell you, I'm still not
09:07:02 25 certain -- I'm not entirely certain I'm going to give you

09:07:07 1 one on graphical representations. I'm not entirely
09:07:10 2 certain I'm not going to say that it's not just plain and
09:07:13 3 ordinary meaning. And if you guys want to take that up
09:07:16 4 and say I screwed up, that's fine. But it does seem --
09:07:22 5 that seems to be a hard one for me to feel like it needs
09:07:25 6 to be construed. But that's why we're here.

09:07:28 7 MR. CALDWELL: I tend to agree with you. And, I
09:07:30 8 mean, my slides are over there. One of my first notes in
09:07:32 9 my slide is -- note to self is 999 times out of a
09:07:35 10 thousand, I would just be saying it's plain meaning. The
09:07:38 11 problem we have is, we know defendant is going to be
09:07:42 12 pointing to a prior art reference that is just pure text
09:07:45 13 to say that's a graphical representation of the potential
09:07:48 14 match, simply because it appears on something like Windows
09:07:52 15 or GUI.

09:07:53 16 And so, that's why we raise it to you is because
09:07:56 17 whereas, I think the plain meaning's correct and worried
09:07:59 18 about 02 Micro.

09:08:00 19 THE COURT: And just so you all know, as you
09:08:03 20 might imagine, after having done this for 20 years, it's
09:08:06 21 not lost on me why -- it's not lost on me either why the
09:08:10 22 defendant is proffering a construction or why they're
09:08:14 23 proffering the construction they're proffering. I've had
09:08:16 24 a pretty good idea of the reason for that. And so, that
09:08:20 25 doesn't mean it's not right, but I get why they're doing

09:08:24 1 it.

09:08:25 2 So why don't I hear, then, from the defendant
09:08:27 3 first on graphical representation and they can explain to
09:08:31 4 me why they're right.

09:08:37 5 MR. DRAYTON: Thank you, your Honor. We have a
09:08:39 6 graphic for you to put up on the screen.

09:08:41 7 THE COURT: Okay.

09:08:42 8 MR. DRAYTON: And before I do that, your Honor, I
09:08:44 9 do want to introduce Elizabeth Monteleone from Bumble,
09:08:47 10 who's in the courtroom. If I could ask Elizabeth to stand
09:08:51 11 up.

09:08:52 12 THE COURT: Pleasure having you here.

09:08:53 13 MR. DRAYTON: And she's Bumble's inhouse counsel
09:08:55 14 and their sole inhouse counsel lawyer, I believe, as of
09:08:58 15 today; is that correct?

09:08:59 16 MS. MONTELEONE: (Moving head up and down.)

09:09:00 17 THE COURT: Very good. Where are you from,
09:09:01 18 ma'am?

09:09:03 19 MS. MONTELEONE: Originally from Virginia.

09:09:04 20 THE COURT: And where do you live now?

09:09:06 21 MS. MONTELEONE: In Austin.

09:09:06 22 THE COURT: Oh, okay. Well, good. Glad. So one
09:09:09 23 of us does still live in Austin.

09:09:12 24 So proceed, please. You have the same computer
09:09:32 25 skills I do in presentations.

09:09:33 1 MR. DRAYTON: So, your Honor, I have an overview,
09:09:35 2 but I think the overview -- I could go through it now, but
09:09:37 3 it may relate more to another term. But I'll just briefly
09:09:41 4 go through it, if you don't mind.

09:09:43 5 THE COURT: Sure.

09:09:44 6 MR. DRAYTON: So -- and we'll hand out a copy of
09:09:46 7 our slides. Sorry about that, your Honor.

09:10:06 8 So if we could go to the next slide in the
09:10:08 9 presentation in slide 3. So, your Honor, first, we look
09:10:15 10 at the background of the invention, and obviously this is
09:10:18 11 a matching system. And there were matching systems that
09:10:22 12 predated the -- all of the patents asserted in this case.
09:10:26 13 And the inventor said they were trying to tackle some
09:10:30 14 problems.

09:10:30 15 So one problem was limiting searches to within
09:10:34 16 the matching profile system, as opposed to going outside
09:10:37 17 of that system and getting profile information of
09:10:40 18 potential matches from other systems. So that was one
09:10:42 19 problem identified in the patent.

09:10:44 20 The next problem is basically having more optimal
09:10:49 21 matches because in the prior art, there were too many
09:10:53 22 irrelevant search entities, which in this case would be
09:10:55 23 potential matches. And then, the third was unwanted or
09:10:59 24 nuisance communications, and that could be remedied in
09:11:03 25 multiple ways, including more optimizing with respect to

09:11:07 1 the matching algorithms. So those are the three things
09:11:10 2 that at least expressed in the patents, and we have cites
09:11:12 3 to them.

09:11:13 4 Go to the next slide. So then, the inventors
09:11:19 5 summarized their invention in the summary of invention.
09:11:22 6 And so, they talk about receiving a plurality of user
09:11:27 7 profiles, that the profile is comprised of various traits
09:11:30 8 that they can use to do matching and perform scoring and
09:11:33 9 matching algorithms. And then, there would be preference
09:11:36 10 indications used in the matching process.

09:11:39 11 And so, these were the things that in the summary
09:11:42 12 of the invention, they talk about is the solutions. So
09:11:46 13 now, in the detailed disclosure, they have a system and
09:11:52 14 it's in figure 1, and figure 4. And so, you have the
09:11:56 15 matching profile system with a server. You have users
09:12:00 16 that interact with that. And then, if you look at figure
09:12:04 17 4, you have the matching system, and then, you have a
09:12:08 18 separate social networking platform that can, I guess,
09:12:13 19 interact with the matching profile server and system.

09:12:16 20 So that's what figures 1 and 4 talk about. Then
09:12:21 21 there are additional figures in the patent, but each one
09:12:23 22 of those figures are variations, or enhancements, or part
09:12:28 23 of the system discussed in figure 1 and figure 4. And if
09:12:32 24 you read the specification in totality, it talks about you
09:12:37 25 may do this, may do that, you may do this, is one system

09:12:41 1 that they disclosed with slight variations. And that's
09:12:45 2 when you read the specification in totality, that's what
09:12:48 3 we walk away from.

09:12:49 4 So I thought it was important to go over the
09:12:52 5 prosecution history very briefly. And so, they had
09:12:58 6 originally filed a claim, and it was just receiving
09:13:03 7 profiles, receiving a preference indication, determining
09:13:06 8 potential matches, and presenting the matches. So that
09:13:10 9 was the first thing they said. This is what we invented,
09:13:12 10 this is what we want to claim.

09:13:14 11 Then they -- before the pricings got started,
09:13:18 12 there was a preliminary amendment. They added basically
09:13:21 13 the computer to it. The first claim didn't have a
09:13:24 14 computer to it. And as a patent lawyer, you wouldn't be
09:13:27 15 surprised with the timing of the dates why they would do
09:13:31 16 that. And they also talked about enabling communication
09:13:35 17 if a second user expressed approval. So that's added to
09:13:39 18 this preliminary amendment.

09:13:41 19 Then the prior art comes into play in this act of
09:13:46 20 prosecution. When they were -- when the examiner put
09:13:50 21 forth prior art and he said anticipated or in combination
09:13:54 22 was obvious over their claims, they amended their claims.
09:13:59 23 And so, at a high level, they add the multiple devices,
09:14:03 24 not just the computer; now it's more than one electronic
09:14:06 25 device, and swiping is added. And there may be some other

09:14:11 1 things added, but at a high level, those things were added
09:14:14 2 to overcome the prosecution -- the prior art that the PTO
09:14:19 3 found.

09:14:19 4 And then, not being able to overcome the hurdle
09:14:24 5 with those claim amendments, there's a second set of claim
09:14:29 6 amendments. So then, they add this concept of not
09:14:32 7 allowing communication. And I don't have it for you on
09:14:37 8 the slide, but subsequently, they didn't overcome the
09:14:42 9 prior art with those amendments, and they added initial
09:14:45 10 communications to one of the -- phrases when you talk
09:14:48 11 about determining to enable communications, they added
09:14:52 12 determining to enable initial communications and a third
09:14:56 13 round of amendments.

09:14:57 14 So I may refer back to this, so I wanted to just
09:15:00 15 summarize it at the outset. Now, with regard to graphical
09:15:04 16 representation, I could understand why your Honor says
09:15:08 17 plain meaning. We say a summary of information that's
09:15:15 18 displayed on a graphical interface. And the graphical
09:15:20 19 representation is basically, it has to represent a ton of
09:15:26 20 information because, number one, it represents a match,
09:15:31 21 and a match could be simplistic. It's a person, you
09:15:34 22 represent a person. But then, you have a graphical
09:15:37 23 representation of a profile, which is an extensive amount
09:15:43 24 of data. And then, they talk about the graphical
09:15:45 25 representation of an item of information, which is more

09:15:49 1 data than a profile.

09:15:52 2 And so, it's our position that when you look at
09:15:54 3 the claims and you look at the use of graphical
09:15:57 4 representation, it's no way it could be limited to or
09:16:01 5 require a picture, and the intrinsic record does not
09:16:07 6 discuss or require that. And a picture is one of many
09:16:10 7 things that would go into a profile, but it is not
09:16:14 8 required.

09:16:17 9 And so, I won't bore you, your Honor, with the
09:16:19 10 claims, but I just highlighted the claims because it talks
09:16:22 11 about a graphical representation of an item of information
09:16:25 12 that comprises a graphical representation of a profile.
09:16:34 13 And so, that's a substantial amount of data. So we
09:16:39 14 highlight in this -- what are they really talking about in
09:16:43 15 a profile? And as you can see, and highlighted in red, a
09:16:46 16 lot of different data points that can go into a profile:
09:16:50 17 Height, weight, age, et cetera. So we spell that out for
09:16:57 18 the Court.

09:16:58 19 What's not in the specification, what's not in
09:17:01 20 the prosecution history is limiting graphical
09:17:04 21 representation to what I call a picture or picture plus
09:17:07 22 something else. And there's two examples in the patent of
09:17:14 23 displaying a user profile.

09:17:16 24 THE COURT: Could --

09:17:20 25 MR. DRAYTON: Yes, your Honor.

09:17:20 1 THE COURT: I'm there. Thank you. I found what
09:17:23 2 I was looking for. Thank you.

09:17:24 3 MR. DRAYTON: Understood.

09:17:24 4 There are two examples in the patent of
09:17:27 5 displaying a user profile or an item of information, and
09:17:35 6 one is figure 1F. And in figure 1F, there's text, there's
09:17:40 7 icons, there's pictures in figure 1F. But there's no
09:17:45 8 requirement in the specification, when you read about
09:17:47 9 figure 1F, that you must have a picture in the profile or
09:17:51 10 that you must display a picture.

09:17:54 11 And then, when you look at figure 6, it's even
09:17:57 12 more informative because in figure 6, if you look at the
09:18:01 13 figure, you might say, oh, it's a picture. But you can't
09:18:03 14 just look at the figure, devoid of the text. And when you
09:18:08 15 look at the text, it talks about what user 14, who's
09:18:14 16 receiving this on their electronic device, what they may
09:18:21 17 be presented with. And the intrinsic record says user 14
09:18:24 18 may be presented with a summary of information regarding a
09:18:28 19 suggested user, a potential match. The summary may
09:18:32 20 include one or more of the following, and picture and icon
09:18:36 21 are one or more of the following.

09:18:38 22 So if you read in the intrinsic evidence, there's
09:18:42 23 no support for picture or picture plus in the plain
09:18:47 24 meaning of graphical representation. That doesn't mean
09:18:50 25 that a picture is not a graphical representation or could

09:18:53 1 not form a part of a graphical representation. It's just
09:18:55 2 there's no requirement that it be the graphical
09:19:00 3 representation or be included in the graphical
09:19:03 4 representation.

09:19:04 5 So then, the word "graphical" is used to modify
09:19:07 6 other claim terms. "Notification" is another claim term.
09:19:10 7 When I read the specification and its discussion of figure
09:19:16 8 9, there's no requirement that it has to include a
09:19:18 9 picture. The system as one would think and person of
09:19:24 10 ordinary skill would think it would include whatever
09:19:28 11 information or a subset or summary of information that's
09:19:29 12 actually in the profile. So there's no requirement to
09:19:32 13 even include a picture and a profile.

09:19:35 14 So our position, in short, is that a pictorial
09:19:38 15 portrayal is something less than a graphical
09:19:41 16 representation. It could be a graphical representation,
09:19:42 17 but it doesn't define the broad scope and it doesn't have
09:19:46 18 to be a part of a graphical representation. To the extent
09:19:49 19 pictorial portrayal means including at least a picture,
09:19:55 20 then we disagree.

09:19:57 21 So I want to -- I'll move on, but I think you get
09:20:01 22 the import. And I don't want to read -- I don't want to
09:20:04 23 just regurgitate what's in our brief as it relates to the
09:20:09 24 claim language. But their claims that use the term
09:20:13 25 "graphical representation" that don't include graphical

09:20:17 1 user interface, they're also terms like gestures and
09:20:20 2 swiping gestures that imply the use of a graphical
09:20:24 3 interface, and they're still used within the claim terms.

09:20:27 4 So to some extent, there's an indication that the
09:20:33 5 fact that we have a summary of information in our
09:20:36 6 construction.

09:20:38 7 THE COURT: Where does summary of information --
09:20:41 8 where do those words come from?

09:20:43 9 MR. DRAYTON: Well, it talks -- when you look at
09:20:45 10 figure 6, it says it will be a summary of information
09:20:49 11 presented to the user. And so, we're relying on intrinsic
09:20:54 12 evidence with regard to that in our construction.

09:20:56 13 THE COURT: Okay.

09:21:03 14 MR. DRAYTON: So different dictionary definitions
09:21:06 15 and extrinsic evidence has been offered. But my only
09:21:09 16 point to the Court is that when you look at those
09:21:10 17 dictionary definitions, they're consistent with the
09:21:15 18 construction and the intrinsic evidence. Because if you
09:21:18 19 look at graphic display device -- and this comes from the
09:21:21 20 dictionary that Match had proposed as extrinsic evidence.
09:21:26 21 It says, graphic display devices can display characters,
09:21:30 22 but they're in the form of graphic image.

09:21:32 23 So our point is that this can include text,
09:21:34 24 picture icons, and other things, and it doesn't solely
09:21:38 25 require a picture. So there's a case that the plaintiffs

09:21:43 1 cite. It's Ameranth and it's Eastern District of Texas
09:21:49 2 case. Judge Everingham's opinion. And interestingly,
09:21:53 3 even though it wasn't cited for this proposition or any
09:21:56 4 proposition related to graphical representation in the
09:21:58 5 briefing, it actually construes graphical user interface.

09:22:02 6 THE COURT: I saw that.

09:22:03 7 MR. DRAYTON: All right. And in doing so, it
09:22:05 8 says -- it uses the term "graphical representation," but
09:22:07 9 if you look at the intrinsic evidence that the Court
09:22:11 10 relies on, it talks -- it says a GUI by drawing images,
09:22:16 11 graphics or texts. And so, that is consistent with the
09:22:19 12 intrinsic evidence. It's consistent with Bumble's
09:22:23 13 construction that graphical representation is no more than
09:22:26 14 a summary of information that would be included in the
09:22:30 15 profile or associated with a user of a matching system, so
09:22:36 16 to speak, and displayed on a graphical user interface.

09:22:39 17 So, your Honor, that's why we'd like for you to
09:22:41 18 construe the term "graphical representation" and construe
09:22:44 19 it as a summary of information displayed on a graphical
09:22:48 20 user interface.

09:22:59 21 THE COURT: Why isn't your proposed construction,
09:23:03 22 though, just repetitive? And what I mean by that is, it
09:23:09 23 says presenting on a graphical interface, a graphical
09:23:13 24 representation. And if I swap in what you would like, you
09:23:18 25 say, presenting on a graphical interface -- summary of

09:23:24 1 information displayed on a graphical user interface. I
09:23:29 2 mean, that's --

09:23:29 3 MR. DRAYTON: Yes. I understand. And I think in
09:23:31 4 our briefing, what we suggested to the Court is to the
09:23:35 5 extent that the claim includes graphical user interface,
09:23:37 6 you don't need to necessarily substitute. You could just
09:23:41 7 have summary of information because the claims talk about
09:23:44 8 it being displayed on a graphical interface. The reason
09:23:47 9 that that doesn't make the term "graphical" superfluous is
09:23:53 10 that it reinforces what a graphical representation
09:23:56 11 actually means.

09:23:58 12 THE COURT: With all due respect, it says
09:24:01 13 presenting on a graphical interface a graphical
09:24:05 14 representation, and with yours, it would be saying,
09:24:08 15 presenting on -- it would be like saying presenting on a
09:24:11 16 graphical interface a graphical representation displayed
09:24:13 17 on a user interface. I'm --

09:24:16 18 MR. DRAYTON: No. I understand.

09:24:17 19 And in our briefing, we said -- to the extent
09:24:20 20 that that term is used, because it's not used in every
09:24:22 21 single -- I think there's one or two that the graphical
09:24:25 22 interface is not included in the claims when they say
09:24:27 23 graphical representation, is just to say summary of
09:24:30 24 information.

09:24:31 25 THE COURT: Okay. I got you.

09:24:33 1 MR. DRAYTON: Right. And that --

09:24:34 2 THE COURT: So if in the claim terms where it
09:24:37 3 doesn't say in the claim term on a graphical interface, in
09:24:43 4 claim 1, for example, summary of information would be
09:24:46 5 sufficient because it's in there. In other places where
09:24:49 6 that is not in there, you would want summary of
09:24:51 7 information displayed on a graphical user interface if
09:24:54 8 that's not articulated in the claim.

09:24:56 9 MR. DRAYTON: Correct.

09:24:57 10 THE COURT: Gotcha.

09:24:59 11 MR. DRAYTON: Correct. And part of it is, the
09:25:00 12 use of a graphical interface has certain implications.
09:25:04 13 There's a reason that graphical modifies user interface.
09:25:07 14 And when you display things on a summary of information on
09:25:10 15 a graphical interface, you get a graphical representation.
09:25:14 16 And I think it's consistent with the intrinsic record, but
09:25:18 17 it's also consistent with the extrinsic record, as well.

09:25:22 18 THE COURT: How does summary of information aid
09:25:28 19 the jury in any way that graphical representation doesn't?

09:25:34 20 MR. DRAYTON: Well, I --

09:25:37 21 THE COURT: In other words, what wouldn't be a
09:25:38 22 summary of information -- what expert comes in here and
09:25:42 23 says, this is not a summary of information, therefore,
09:25:45 24 it's not a graphical representation?

09:25:50 25 MR. DRAYTON: Well, I do think summary of

09:25:52 1 information would be useful to a lay jury, as opposed to
09:25:55 2 the term "graphical representation." However, I do not
09:25:58 3 believe -- I do believe an expert would be able to use the
09:26:03 4 term "graphical representation" if your Honor held it is
09:26:07 5 plain meaning.

09:26:07 6 THE COURT: Let me try a little bit differently.

09:26:09 7 MR. DRAYTON: Apologize.

09:26:10 8 THE COURT: No, no, no. Your answer's better
09:26:11 9 than my question. I'm apologizing for my bad question.

09:26:15 10 I guess what I'm saying is, I think, number one,
09:26:22 11 again, when I was standing in your shoes, what I would
09:26:24 12 want to be doing. I think the words "summary of
09:26:31 13 information" are easier to a jury than "graphical
09:26:35 14 representation," even though neither one means, really, to
09:26:37 15 mean more than the other. For lack of a word, the evil
09:26:41 16 I'm trying to do away with is, how does it constrain and
09:26:45 17 -- how is an expert constrained in either direction when
09:26:49 18 they're saying it's infringing or not infringing? What
09:26:52 19 expert says, oh, that's not a graphical representation
09:26:56 20 because that's not a summary of information, or vice
09:26:59 21 versa.

09:26:59 22 It seems to me, you're not really -- we're not
09:27:05 23 really accomplishing anything, I guess is what I'm saying,
09:27:08 24 if we're worried about an expert who's -- they're going to
09:27:12 25 come in here and they're going to say, yeah, it infringes.

09:27:15 1 Right here, there's a graphical representation. And
09:27:18 2 they're going to say, well, what does that mean? They're
09:27:21 3 going to say, it's a summary of information. And your
09:27:22 4 guy's going to say there's no infringement. Why not?
09:27:25 5 Well, there's no graphical representation. Why not?
09:27:29 6 Well, there's no summary -- that's what I'm trying to get
09:27:30 7 to is, I don't see what we're accomplishing using summary
09:27:34 8 of information here.

09:27:35 9 MR. DRAYTON: Well, I do think that if you use
09:27:38 10 graphical representation, it could confuse a lay jury into
09:27:42 11 believing that it requires a picture. I don't think it
09:27:45 12 requires a picture when you look at the intrinsic evidence
09:27:48 13 and the extrinsic evidence it does not.

09:27:51 14 THE COURT: Okay. Leave aside --

09:27:51 15 MR. DRAYTON: Okay.

09:27:52 16 THE COURT: I mean, you guys are, for lack of a
09:27:56 17 better word, forcing them to say it means anything. And
09:27:59 18 I'm certainly not convinced, I'm probably not convinced
09:28:03 19 that I would limit it to what the plaintiffs have
09:28:05 20 submitted because I think I agree with you that it could
09:28:11 21 be more.

09:28:12 22 However, I'm trying to accom -- I don't know -- I
09:28:20 23 used to think when I was sitting over there that whenever
09:28:22 24 I left and the judge said plain and ordinary meaning, it
09:28:26 25 was like okay, that was, you know, the last refuge to

09:28:29 1 which, you know, scoundrel claims. It's -- they're not
09:28:33 2 doing it.

09:28:36 3 But what I'm finding on this side and you're
09:28:37 4 going to see as I -- I'm going to say this a lot later is
09:28:45 5 plain and ordinary meaning is when I'm sitting up here and
09:28:47 6 I'm unpersuaded that either side's proposed constructions
09:28:50 7 accomplish anything that the words in the claim term don't
09:28:54 8 say themselves.

09:28:56 9 MR. DRAYTON: Well, I don't disagree with that,
09:28:57 10 your Honor. I think that we would try to avoid for your
09:29:02 11 Honor and avoid down the road is if the experts were sort
09:29:07 12 of moving into an 02 Micro situation where they're trying
09:29:12 13 to construe the plain and ordinary meaning and they're
09:29:14 14 debating whether it includes a picture, or requires a
09:29:17 15 picture, or doesn't require a picture.

09:29:21 16 And so, maybe the view on our part is that when
09:29:23 17 we think that that's an issue, we raise it with the Court.

09:29:26 18 THE COURT: I think that's the time for it to
09:29:28 19 come up. I tell you what I'm going to do and unless the
09:29:31 20 plaintiff's lawyer really feels like they've gotta say
09:29:33 21 something, here's -- I'm going to go with plain and
09:29:37 22 ordinary meaning on this and let me explain why for the
09:29:39 23 record.

09:29:41 24 I don't think summary of information is any
09:29:43 25 different than graphical representation. It's just

09:29:46 1 different words. I think displayed on a graphical user
09:29:51 2 interface is repetitive in at least some of the claims.
09:29:55 3 If you were to come to me and argue that it needed in the
09:29:58 4 claims where that -- in the claim terms where that was not
09:30:04 5 said, I agree with you. I do think it has to be on a --
09:30:08 6 displayed on a graphical user interface. I'm with you.

09:30:11 7 In those claims which may not now be asserted --
09:30:15 8 they might be. I don't know. But if I've gotta take that
09:30:17 9 up, I'll take that up when you're arguing whether there's
09:30:20 10 infringement or not in that regard. But I also don't feel
09:30:23 11 that -- I would not go in any situation with what I think
09:30:30 12 on your part, on defendant's part is a limitation I don't
09:30:33 13 see in the specification, which is that it has to
09:30:36 14 represent potential match, online dating profile, term of
09:30:41 15 information or user. I just -- I think you're going too
09:30:44 16 far there.

09:30:45 17 So I think plain and ordinary meaning is the best
09:30:48 18 we could do in this, and if there's a fight over that down
09:30:50 19 the road, you guys come back to me.

09:30:54 20 Yes, sir.

09:30:54 21 MR. DRAYTON: Thank you, your Honor.

09:30:57 22 MR. CALDWELL: I started a long time ago that you
09:31:00 23 normally don't go and argue something after the judge says
09:31:02 24 that this is what my ruling is, but I'm afraid to leave it
09:31:05 25 untouched, having -- them having gone first. And I'll do

09:31:09 1 my best not to be -- not to be redundant.

09:31:12 2 THE COURT: No.

09:31:12 3 I mean, what I would focus on if I'm persuaded by
09:31:15 4 them that yours is incorrect, that it would -- that it
09:31:21 5 means a pictorial portrayal unless you can persuade me
09:31:25 6 there's somewhere in there in the specification that gives
09:31:28 7 you that purchase.

09:31:32 8 MR. CALDWELL: Okay. And I think I can do that
09:31:33 9 and I want to do that. But I want to make sure that I
09:31:37 10 understand what it is that you think is wrong with ours.

09:31:40 11 Is it because you're thinking that it's connoting
09:31:42 12 like a photograph?

09:31:43 13 THE COURT: No. I just don't -- I didn't see
09:31:46 14 anywhere in your argument where you got me to a part of
09:31:49 15 the specification that said it had to be a pictorial
09:31:52 16 portrayal.

09:31:53 17 MR. CALDWELL: Okay.

09:31:54 18 THE COURT: That the graphical representation --
09:31:56 19 I don't like the defendant's proffered construction
09:31:59 20 because I think it's limiting that they want it to say it
09:32:02 21 has to be their things. And I find yours is equally
09:32:07 22 unpersuasive that it has to be -- a graphical
09:32:11 23 representation has to be a pictorial portrayal.

09:32:14 24 MR. CALDWELL: Okay.

09:32:14 25 THE COURT: Now, if you're worried that they're

09:32:16 1 going to come in here and argue invalidity based on
09:32:22 2 something, for example, as you said, that's just text, I
09:32:27 3 don't know that I would find that that would be invalid,
09:32:31 4 either. I don't know that that would be sufficient, I
09:32:35 5 mean, that someone wants to take up.

09:32:36 6 But I'm not going to go with yours just to avoid
09:32:43 7 the invalidity arguments coming down the road for some
09:32:47 8 piece of art to have.

09:32:48 9 MR. CALDWELL: Well, I totally understand if what
09:32:51 10 we are saying is, this fight over whether or not text on a
09:32:55 11 GUI is sufficient. If we're saying that that fight is
09:32:57 12 tabled for another day and, you know, in that context that
09:33:00 13 we're looking at the art, that I'm okay with. I think to
09:33:04 14 say -- because if what you're saying now is that you are
09:33:06 15 concluding that just text, because it happens to be on a
09:33:12 16 GUI, is a graphical representation of the potential
09:33:15 17 match --

09:33:15 18 THE COURT: I'm actually not saying that. No,
09:33:17 19 no, no. In fact, I'm saying just the opposite. I'm
09:33:19 20 saying I don't know whether that is or not. I would want
09:33:23 21 to -- I think that's something that I would look at on a
09:33:27 22 summary judgment basis.

09:33:28 23 MR. CALDWELL: I see.

09:33:29 24 THE COURT: I just -- I don't know -- I think, to
09:33:33 25 me, that would be a motion for summary judgment that they

09:33:35 1 would file saying the patent's invalid because this piece
09:33:40 2 of art does it, and I would want to look at it and decide
09:33:43 3 whether or not I thought that constituted a graphical
09:33:46 4 representation or not.

09:33:47 5 MR. CALDWELL: That clarity is very much
09:33:49 6 appreciated because I was afraid that the record might
09:33:51 7 reflect that you had already --

09:33:53 8 THE COURT: No.

09:33:53 9 MR. CALDWELL: -- weighed in on that. And, I
09:33:55 10 mean, if the Court want --

09:33:55 11 THE COURT: No.

09:33:57 12 Let me make clear I've done the opposite. I'm
09:33:59 13 reserving that. And I'm glad you raised that because
09:34:02 14 defense counsel may have heard the way you did and come in
09:34:05 15 later and say, you've already ruled on this. I've had
09:34:07 16 that happen.

09:34:08 17 MR. CALDWELL: Right.

09:34:09 18 THE COURT: And I wouldn't -- I'm not smart to
09:34:10 19 remember what I did.

09:34:13 20 MR. CALDWELL: I don't think that's the case.

09:34:14 21 THE COURT: It's much -- no, it is. It's much
09:34:16 22 better that we make as clear as possible what it is I'm
09:34:19 23 thinking out loud.

09:34:19 24 MR. CALDWELL: Yes, sir.

09:34:20 25 THE COURT: I am unhappy with the two claim

09:34:23 1 constructions that you all proffered.

09:34:26 2 MR. CALDWELL: Yes, sir.

09:34:27 3 THE COURT: I think plain and ordinary meaning is
09:34:29 4 the appropriate one. But I'm not determining in any way
09:34:33 5 whether or not text would be sufficient or insufficient.

09:34:36 6 MR. CALDWELL: Right.

09:34:37 7 THE COURT: To their side, I may find that it is.
09:34:40 8 But I'm not making that decision today or even forecasting
09:34:44 9 what I would do.

09:34:45 10 MR. CALDWELL: I understand.

09:34:46 11 Your Honor, there was one time I was in a hearing
09:34:48 12 with Judge Clark and he said, hey, don't talk me out of my
09:34:50 13 ruling, which is like here, sit down. What I'm afraid of
09:34:53 14 is, you've gotten a -- this did start with sort of
09:34:56 15 something of a high level interview that is going to be
09:34:59 16 informative both for this term and to others.

09:35:02 17 And if your Honor would indulge me, I want to
09:35:06 18 take maybe literally around 60 seconds to do that. But
09:35:09 19 then, I want to direct you to something on this point that
09:35:10 20 I think this needs to be part of the record --

09:35:12 21 THE COURT: Sure. Y'all have as much time as you
09:35:14 22 want.

09:35:16 23 MR. CALDWELL: And by way of background -- I know
09:35:18 24 you're super familiar with patents and prosecution. Just
09:35:20 25 so you understand the way that this unfolded, there was an

09:35:24 1 application that was filed by employees of Match like
09:35:27 2 old-school match.com website that was filed a long time
09:35:32 3 ago. Later, there was a CIP that adds new matter.

09:35:35 4 THE COURT: Sure.

09:35:36 5 MR. CALDWELL: That becomes the whole swiping
09:35:38 6 then. So whenever you see references to figures 1D and
09:35:42 7 1F, this is old-school Match. Then when you see the 6,
09:35:46 8 figure 6, which, John, I don't know if we're -- so this
09:36:00 9 stuff from 6, which I've annotated. And yes, Harry is
09:36:03 10 female, as well, and -- but, you know, humor me for the
09:36:06 11 sake of using the pictures that were in the patent.

09:36:09 12 This is when we added basically one says yes, one
09:36:13 13 says no. You don't get anywhere. They both say yes.
09:36:16 14 Then you get the opportunity to send the message and start
09:36:19 15 communicating because both have mutually opted in and
09:36:23 16 then, you can message. So that's why I really thought it
09:36:25 17 was going to be 60 seconds. It was probably more like, I
09:36:29 18 don't know, 10.

09:36:30 19 What I think is important -- your Honor has
09:36:32 20 already hit on this -- is, you made some reference to how
09:36:36 21 in the proposal -- it might have been theirs, it might
09:36:37 22 have been ours -- we both have square brackets, the
09:36:41 23 concepts of it being a potential match or an online dating
09:36:43 24 profile. And that's just the context in which graphical
09:36:46 25 representation of fill-in-the-blank occurs in the claim.

09:36:50 1 I think the best illustration and the one we both choose
09:36:53 2 to use is exemplary is graphical representation of a first
09:36:56 3 match. But as you discussed, and I won't go back through
09:37:00 4 it, the claims or at least some of them, the fact that any
09:37:03 5 of them separately require that that is on a graphical
09:37:06 6 user interface is what I think is important.

09:37:09 7 So the risk here is under --

09:37:13 8 THE COURT: If you didn't put it in your claim,
09:37:15 9 then it should not be there.

09:37:16 10 MR. CALDWELL: I mean, that's right. I think
09:37:19 11 we're running the risk of completely obliterating any
09:37:23 12 meaning on graphical and resulting in this simply saying,
09:37:28 13 "representation of a first match on a graphical user
09:37:31 14 interface" if we don't give some meaning to graphical.

09:37:33 15 I understand you may not like pictorial
09:37:36 16 portrayal, and Mr. Summers and I have healthy debate about
09:37:39 17 that, but it just is trying to find a dictionary
09:37:42 18 definition. In other words, not trying to deviate from a
09:37:44 19 plain meaning, but trying to actually give some meaning to
09:37:47 20 graphical if someone's going to turn around and contend
09:37:51 21 that graphical has no meaning, as long as you're
09:37:55 22 separately already on a graphical user interface.

09:37:57 23 So we're not wed to pictorial. It could be
09:38:01 24 image. It could be anything when you look up what a
09:38:04 25 graphic is, or graphical, that kind of thing is the

09:38:07 1 concept. But the word "graphical" has meaning. It's not
09:38:10 2 just a representation.

09:38:12 3 And I'll scoot forward --

09:38:14 4 THE COURT: Well, because -- and your point is,
09:38:16 5 and leaving aside whether or not they have a patent or
09:38:18 6 not, for a second, the magic of this is that when Harry
09:38:25 7 sends Sally something, they're not just getting back a
09:38:29 8 text message, they're getting back something that
09:38:31 9 graphically represents two Sally is. And that's part of
09:38:34 10 the secret sauce of the way this works.

09:38:37 11 MR. CALDWELL: A slight variation of that. It's
09:38:38 12 not when Harry and Sally are communicating per se, at
09:38:41 13 least in that example. It's more that when the Tinder
09:38:44 14 servers or the Bumble servers, right, or the hypothetical
09:38:47 15 one that's in the patent is proposing -- I remember from
09:38:53 16 our first hearing, you said you had a general
09:38:54 17 understanding of how this works. Not that you had used
09:38:57 18 it. You were careful to note that. But if it --

09:38:58 19 THE COURT: I would have used it, believe me. I
09:39:01 20 have nothing against using it.

09:39:03 21 MR. CALDWELL: The hypothetical Judge Albright.

09:39:05 22 THE COURT: I wound up meeting my fiance the
09:39:07 23 old-fashioned way. We just met. But I have nothing
09:39:09 24 against this. I would have used this like mad if I would
09:39:12 25 have known it existed.

09:39:14 1 MR. CALDWELL: I appreciate that. So does the
09:39:15 2 client. So the hypothetical Judge Albright is in college
09:39:17 3 and just single as can be, and you're getting profiles
09:39:21 4 from -- it's when that profile comes to you of a proposed
09:39:26 5 -- some girl that you might be interested in. It's that
09:39:29 6 is the graphical representation of a first potential
09:39:34 7 match.

09:39:35 8 So it's not text representation presented on a
09:39:39 9 GUI. It's not just representation presented on a GUI. It
09:39:42 10 is a graphical representation of the match that is
09:39:47 11 presented on the GUI. And so, it's a graphical
09:39:50 12 representation of Sally that -- and that's the problem
09:39:54 13 with their construction is, they are reading out that the
09:39:57 14 representation of Sally would be graphical and saying it
09:40:01 15 doesn't matter what the representation of her is as long
09:40:05 16 as it's displayed on a GUI.

09:40:08 17 So you're just giving no meaning to graphical as
09:40:10 18 a modifier for representation. That is our fundamental
09:40:15 19 problem.

09:40:16 20 And when you actually look at the new matter that
09:40:19 21 was added and claimed and once it became a Tinder app and
09:40:23 22 not just the old Match system, that's when you get all
09:40:27 23 these figures, which I won't belabor. But it's the ones
09:40:31 24 here's the picture, likes, likes, no, you have a match.
09:40:34 25 It's -- it is part of the secret sauce, quite frankly,

09:40:39 1 that you're sending these pictures, people swipe and you
09:40:42 2 get matches.

09:40:43 3 And I don't mean to belabor that, but I think it
09:40:46 4 is very important that --

09:40:47 5 THE COURT: Well, then, why are you unhappy with
09:40:49 6 their construction -- their proposed construction?

09:40:52 7 MR. CALDWELL: Well, because they simply say --
09:40:55 8 they simply want it to be a summary of information that is
09:40:57 9 displayed on a GUI. It's not -- that's not a graphical
09:41:02 10 representation of Sally. And I made a -- John, would you
09:41:07 11 go to.

09:41:10 12 THE COURT: Well, it sounds to me like, with all
09:41:13 13 due respect, that you want something and I get what you
09:41:17 14 want. And I'm not even sure you're wrong and I'm not even
09:41:20 15 sure that the defendant would argue with it. But it
09:41:23 16 sounds to me like you want something better than pictorial
09:41:27 17 portrayal. Because pictorial portrayal, to me, isn't -- I
09:41:33 18 don't think is exactly what you're saying, either. It's
09:41:35 19 insufficient. It's not the graphical representation that
09:41:39 20 you're talking about here, I don't think.

09:41:42 21 MR. CALDWELL: I'm not following your Honor.

09:41:43 22 THE COURT: I don't think that -- I think what
09:41:46 23 you're saying, too, is that the graphical representation
09:41:50 24 that comes back is more than just the pictorial portrayal,
09:41:55 25 as well. It's Sally's profile -- I mean, it's a graphical

09:42:01 1 representation of Sally, right? It's not just the
09:42:04 2 pictorial that's coming back.

09:42:06 3 MR. CALDWELL: No. It can be just a picture. It
09:42:11 4 can be more. I think the claim is met by -- the first
09:42:15 5 potential match is Sally.

09:42:17 6 THE COURT: Yes.

09:42:18 7 MR. CALDWELL: It can be met by a graphical
09:42:23 8 representation of Sally. It could be a picture. It
09:42:26 9 could, I guess, be a stick figure. I mean, it's a --

09:42:29 10 THE COURT: Well, no. And you're actually making
09:42:31 11 my point. Claim 1 says, a method of navigating a user
09:42:35 12 interface comprising, presenting on a graphical interface
09:42:38 13 a graphical representation of a first item of information.
09:42:43 14 But it could be many things other than just -- what
09:42:48 15 happens in y'all's system is, it turns out to be a
09:42:50 16 pictorial portrayal. But that isn't what it necessary --
09:42:54 17 the graphical representation necessarily has to be, is it?
09:42:57 18 It could be -- as you say, it could be a number of things.

09:43:01 19 MR. CALDWELL: Well, I think that whatever item
09:43:04 20 of information is presented has to be a graphical
09:43:07 21 representation of it. Because my point is, it's not the
09:43:12 22 case that whatever they send you is inherently a graphical
09:43:16 23 representation because it's on a graphical user interface
09:43:19 24 because that is entirely redundant.

09:43:21 25 THE COURT: I got you.

09:43:22 1 MR. CALDWELL: And so, I'm simply saying -- and
09:43:24 2 I'm -- this is we're fundamentally fine with the plain
09:43:27 3 language but we -- maybe you're saying it's not a dispute
09:43:31 4 that's ripe for today. But our problem was, we could
09:43:33 5 foresee that this looked like it was going to be an 02
09:43:36 6 Micro problem. And we're in this situation where I would
09:43:38 7 be happy to propose plain meaning because I don't think we
09:43:42 8 have to redefine it for the jury. But I'm worried that we
09:43:44 9 are acquiescing in what we believe to be a
09:43:48 10 misunderstanding that they have.

09:43:50 11 So I think whether it's the item of information,
09:43:52 12 or what have you, it has to be represented graphically and
09:43:56 13 I think that -- if I could go to slide 16. Again, I'm not
09:44:00 14 wed to the word "pictorial," but we've provided dictionary
09:44:04 15 definitions and whatnot. I mean, I don't know that
09:44:06 16 graphical really needs defined, but we just took pictorial
09:44:10 17 from a dictionary to try to elucidate that idea.

09:44:16 18 And I have had this debate as to whether does
09:44:19 19 that mean, a photograph? No.

09:44:21 20 THE COURT: I think here's what I'm going to do.
09:44:23 21 I'm going to order plain meaning. At some point in the
09:44:25 22 future, your side -- I'm pointing this -- defendant's side
09:44:33 23 is going to say -- it might say or it might not say
09:44:39 24 there's no -- we'll just see how it comes out. It may be
09:44:41 25 an infringement context. It may be an invalidity context.

09:44:45 1 Y'all do your reports, you frame it up. One side or the
09:44:48 2 other could file a motion for summary judgment, and by the
09:44:51 3 time you do, I have a really, really smart law clerk who
09:44:55 4 will be able to read it and get it correct.

09:44:57 5 MR. CALDWELL: Yes, sir. If I'm not testing your
09:45:00 6 patience, may I note something on the record that I don't
09:45:02 7 know that we said it the way I'd like to kind of in our
09:45:04 8 brief, and I just think it might be helpful if you have to
09:45:07 9 look at this particular issue?

09:45:08 10 THE COURT: Sure.

09:45:09 11 MR. CALDWELL: This what I've put on the screen
09:45:11 12 here and do you know which -- this is slide No. 21. What
09:45:14 13 this is on slide No. 21 is the declaration of defendant's
09:45:18 14 expert when -- and I want to respond to your question to
09:45:22 15 Mr. Drayton where you asked, where did you get the word
09:45:25 16 "summary of information," if you'll recall that.

09:45:27 17 THE COURT: I do.

09:45:28 18 MR. CALDWELL: What their expert did to come up
09:45:30 19 with the summary of information -- I mean, my colors don't
09:45:34 20 mean a lot in this picture. But there's the first
09:45:37 21 sentence where he points to the specification and cites
09:45:39 22 lines 8 through 10 of column 21. You'll see that. Then
09:45:44 23 he goes to his next sentence. He skips over eight lines
09:45:48 24 of the spec, and he cites lines 18 to 22 of the spec,
09:45:53 25 which is where summary of the invention comes up.

09:45:57 1 So directly to your point as to where summary of
09:45:59 2 the invention comes up and to your original question to me
09:46:02 3 as to where do I go to this imagery stuff in the spec,
09:46:06 4 when we look at column 21, what I've highlighted in sort
09:46:10 5 of a very pale purple here is the portion of the spec he
09:46:16 6 skips over to try to be able to point to --

09:46:18 7 THE COURT: He wouldn't do that.

09:46:19 8 MR. CALDWELL: He might. He did. He point -- he
09:46:22 9 skips over to jump to the summary of the invention. He
09:46:25 10 skips over the display may show an image of a suggested
09:46:28 11 user and one or more aspects of the suggested user's
09:46:33 12 profile information. In some embodiments, the combination
09:46:36 13 of image, and whatnot, is displayed as a card representing
09:46:40 14 a set of users.

09:46:40 15 And I just wanted to note that because I think
09:46:42 16 that we -- to get the words "summary of the information,"
09:46:47 17 we literally skipped over the description of the graphical
09:46:51 18 representation, which is this image on the card. And
09:46:54 19 anyway, I understand your Honor's ruling. I think that --

09:46:57 20 THE COURT: You all -- like I said, you all have
09:47:01 21 -- are enormously lucky because by the time you all have
09:47:04 22 to deal with this, I have someone really, really smart
09:47:07 23 that will be able to read all this, and between the two of
09:47:10 24 us, we'll get it right.

09:47:12 25 MR. CALDWELL: Yes, sir.

09:47:12 1 THE COURT: But I think I'm happy with plain and
09:47:15 2 ordinary meaning for the pictorial portrayal -- I'm sorry,
09:47:18 3 for graphical representation.

09:47:21 4 Let's move on to "without allowing
09:47:24 5 communication."

09:47:31 6 MR. DRAYTON: Your Honor, may I proceed?

09:47:32 7 THE COURT: Absolutely. Yes, sir.

09:47:39 8 MR. DRAYTON: And as you can imagine, your Honor,
09:47:42 9 I appreciate your ruling and I won't say another word, but
09:47:47 10 when the day comes, we will have appropriate answers for
09:47:50 11 some of the things counsel mentioned to you.

09:47:52 12 THE COURT: I understand. And I will have
09:47:56 13 forgotten by then what he said.

09:47:59 14 MR. DRAYTON: Okay. So "preventing
09:48:02 15 communication" is a term in the 811 patent, and then,
09:48:08 16 "without allowing" or "without allowing communication" is
09:48:11 17 a term in the 854 patent. And as your Honor may know, the
09:48:18 18 854 patent, those claims were filed post-litigation, after
09:48:22 19 this case was actually in federal court.

09:48:27 20 So our construction is an affirmative action
09:48:31 21 showing no communication between two users. We shifted
09:48:35 22 that so that it could be inserted to a claim construction
09:48:38 23 but not materially shifted to performing an affirmative
09:48:42 24 act to ensure no communication between two users.

09:48:47 25 Match's construction is plain meaning.

09:48:50 1 When we look at the specification, the
09:48:52 2 specification uses the word "allow," and in the
09:48:59 3 specification, in figure 10, which is not devoid, as I
09:49:05 4 mentioned to you, from the overall server of figure 1 and
09:49:11 5 the system of figure 1 in combination with figure 4, it
09:49:14 6 says that the matching server 20 will not allow
09:49:18 7 communication between two users. That is part of the
09:49:22 8 support for the term "preventing communications" that were
09:49:28 9 put into the claims to overcome prior art.

09:49:30 10 Now, there's a flowchart or an algorithm in part
09:49:38 11 or an excerpt of an algorithm that's used to describe
09:49:41 12 figure 10. And in that algorithm, it doesn't talk about a
09:49:45 13 default state of any kind. It just says that under
09:49:49 14 certain circumstances, it will not allow communication.
09:49:54 15 Doesn't talk about within that box, how it happens; it
09:49:58 16 does talk about it within the specification.

09:50:02 17 So I want to take a step back because the patent
09:50:05 18 talks about enabling communication. And we just have on
09:50:11 19 this particular slide, your Honor, examples of what it
09:50:16 20 means to enable communication between two users. I won't
09:50:21 21 belabor that point. And then, there's preventing and
09:50:25 22 allowing communication. And we have the excerpts from the
09:50:28 23 specification that could support this concept of
09:50:32 24 preventing without allowing communication. And it talks
09:50:38 25 about this matching server 20 will not allow communication

09:50:41 1 between two users, and also talks about matching server 20
09:50:45 2 does not allow communication between two users.

09:50:49 3 Now, this is when one of the two users says it
09:50:53 4 does not want to communicate with the other user when
09:50:56 5 they're presented with some information about the user as
09:51:00 6 a potential match.

09:51:04 7 In the prosecution history, when they added
09:51:08 8 "preventing communication" as a claim element, after a
09:51:14 9 user rejected another user, they had to defend it, and
09:51:20 10 they tried to explain why it was different from a prior
09:51:23 11 art, a Janssens reference. They said enabling and
09:51:27 12 disabling communication is what they were talking about.
09:51:31 13 Disabling communication. That's an affirmative act.
09:51:34 14 That's not a passive act. And that's in the prosecution
09:51:36 15 history as the patentee described their invention to the
09:51:41 16 patent office to overcome prior art.

09:51:43 17 So I won't belabor that point, but I think it is
09:51:46 18 significant because it's part of the intrinsic record and
09:51:48 19 it's giving life to the words that were in the
09:51:51 20 specification, before they inserted the claim element into
09:51:54 21 play in the patent office.

09:51:55 22 So I do think it's important at a high level when
09:52:05 23 we talked earlier about the summary of invention, you
09:52:09 24 won't see anything about disabling or preventing
09:52:11 25 communication in the summary of invention. So -- and

09:52:16 1 then, when they started the prosecution of the 811, you
09:52:19 2 didn't see anything about preventing communication, or
09:52:22 3 disabling, or anything of that notion, or the things that
09:52:27 4 talk -- or the parts of the specification that talk about
09:52:30 5 not allowing communication. They're not in those claims.

09:52:34 6 So why is disabling necessary? So that came up
09:52:40 7 in the briefing. Well, the specification discloses
09:52:44 8 various instances where the system enables communication.
09:52:49 9 So it's not just because I was showed a match, I rejected
09:52:53 10 the match, and it said no to communications. There's
09:52:57 11 other aspects, other ways -- I say yes to a match. So,
09:53:01 12 your Honor, if you wanted to match me up with somebody,
09:53:04 13 the specification talks about you being able to do that as
09:53:06 14 a user of the system and enabling communication.

09:53:12 15 So 101 matching is not the only description of
09:53:17 16 how communication is enabled in the patent. It's just one
09:53:21 17 of many ways. The claims disclose one instance where you
09:53:26 18 can have communication between two users if there's a
09:53:28 19 mutual match between them. The claims don't suggest and
09:53:32 20 don't require that that be the only way in a matching
09:53:35 21 system that communication is enabled. And the
09:53:40 22 specification also does not support that, so the claims
09:53:42 23 are consistent with the specification.

09:53:44 24 And then, the claims require that if a person
09:53:48 25 affirmatively says no, then all communication is basically

09:53:54 1 not -- is always of enabling communication, but no longer
09:53:59 2 in play. So the disabling term used in the prosecution
09:54:03 3 history makes sense when you read the system in its
09:54:06 4 totality, and that's why they inherently told the patent
09:54:11 5 office, this is about enabling and disabling
09:54:13 6 communication.

09:54:14 7 Because if you didn't enable the communication,
09:54:17 8 after I said no, you could still enable communication,
09:54:21 9 right? So the specification talks about not allowing
09:54:27 10 communication. The patentee said that that not allowing
09:54:29 11 meant disabling. They insert "preventing communication,"
09:54:36 12 and they say, in talking about disabling communication.

09:54:40 13 THE COURT: Can you tell me where in the
09:54:42 14 specification you're referring to in that slide? And tell
09:54:44 15 me which slide you're on, also, please.

09:54:47 16 MR. DRAYTON: I can't see the slide, your Honor.
09:54:49 17 So slide 30 -- well, not slide. Just want to make sure I
09:54:54 18 get you -- so when we talk about not allowing
09:55:02 19 communication, your Honor, it's on slide 30, and it has
09:55:05 20 the cite in the specification to the disclosure that talks
09:55:08 21 about not allowing communication. So that would be column
09:55:12 22 23, lines 14 to 17, and column 23, lines 52 to 55.

09:55:19 23 THE COURT: Okay. But what I want to see is
09:55:21 24 where does not allow communication in the specification is
09:55:28 25 -- it requires an affirmative act.

09:55:31 1 MR. DRAYTON: Well, that's -- I wouldn't say that
09:55:33 2 that is in the specification. That's in the prosecution
09:55:36 3 history.

09:55:37 4 THE COURT: Where in the prosecution history?

09:55:39 5 MR. DRAYTON: Okay. So I think we have a cite.

09:55:52 6 THE COURT: Tell me what page you're on, please.

09:55:57 7 MS. SONI: Slide 31.

09:55:58 8 THE COURT: Thirty-one.

09:56:00 9 MR. DRAYTON: So slide 31, your Honor, but I
09:56:03 10 believe in our briefing, we produced Match's copy of the
09:56:08 11 prosecution history and it's Match 593.

09:56:12 12 THE COURT: Okay.

09:56:13 13 MR. DRAYTON: So in 594 and 595 would be the
09:56:17 14 pages in the prosecution history. We could confirm that
09:56:20 15 we actually provided the Court with the production copy of
09:56:25 16 the prosecution histories.

09:57:30 17 So the prosecution history is Exhibit 8 to the
09:57:34 18 Whelan declaration in Bumble's opening brief, and that has
09:57:39 19 the prosecution history, your Honor.

09:57:47 20 THE COURT: And can you show me one of the claims
09:57:51 21 that includes "without allowing communications" in it?

09:57:59 22 MR. DRAYTON: Well, your Honor, if you look at --
09:58:03 23 it's the 854 patent, but it's slide 36. I think you can
09:58:07 24 see it from --

09:58:08 25 THE COURT: Not on my slide 36.

09:58:15 1 MR. DRAYTON: Are you in the presentation, your
09:58:19 2 Honor?

09:58:19 3 THE COURT: I'm in your presentation. I would
09:58:20 4 like --

09:58:21 5 MR. DRAYTON: I'll show you slide 36. So it's a
09:58:24 6 side-by-side comparison from the patent office of the 811
09:58:28 7 patent claim and the --

09:58:30 8 THE COURT: I gotcha.

09:58:31 9 MR. DRAYTON: -- 854 patent.

09:58:33 10 THE COURT: Thank you.

09:58:33 11 MR. DRAYTON: The 854 patent claim is on the
09:58:36 12 right.

09:58:37 13 THE COURT: Okay. And what you're saying is, in
09:58:48 14 the prosecution history, the way they distinguished over
09:58:51 15 the prior art was by saying the prior art is different
09:58:54 16 because it didn't have enabling and disabling
09:58:57 17 communications.

09:58:59 18 MR. DRAYTON: Correct. And I'm saying, also,
09:59:01 19 that in the specification, that they submitted, the only
09:59:05 20 concepts are this -- is not allowing communication.

09:59:08 21 THE COURT: I got that.

09:59:09 22 MR. DRAYTON: Right. And then, they interpreted
09:59:11 23 to the patent office that that means disabling.

09:59:13 24 THE COURT: As opposed -- but it said but our
09:59:16 25 system is different than what you -- and then, the art

09:59:19 1 we're reading over because our patent allows enabling and
09:59:24 2 disabling. So why wouldn't a construction that would be
09:59:30 3 consistent with the specification here for these two claim
09:59:34 4 terms, "without allowing communication" and "preventing
09:59:39 5 communication," be the terms "disabling communications"?

09:59:43 6 MR. DRAYTON: I think that would be appropriate.

09:59:52 7 THE COURT: Let me hear from the plaintiffs on
09:59:54 8 that because -- and then -- I'm going to give you another
09:59:57 9 chance to speak in just a second. But let me --

09:59:59 10 MR. DRAYTON: I understand, your Honor. Thank
10:00:01 11 you.

10:00:05 12 THE COURT: I'll tell you what -- and the reason
10:00:07 13 I asked you to jump up is because until I was looking at
10:00:13 14 that reference, it seemed to me that I was pretty
10:00:22 15 persuaded that the defendants were correct on preventing
10:00:26 16 communication was an affirmative act like the disabling,
10:00:32 17 but that without allowing communications was not
10:00:35 18 necessarily an affirmative act. But it does appear to me
10:00:39 19 if they're correct about the prosecution history that you
10:00:42 20 all told the examiner that you all -- your patent did
10:00:48 21 allow for disabling of communication, and that's what
10:00:53 22 "without allowing communication" meant. Am I right?

10:00:56 23 MR. SUMMERS: That's not at all what happened,
10:00:58 24 your Honor.

10:00:58 25 THE COURT: Okay.

10:00:59 1 MR. SUMMERS: John Summers on behalf of Match
10:01:05 2 Group.

10:01:05 3 So I think the best place to start is where your
10:01:07 4 Honor is thinking about, and it's this prosecution history
10:01:11 5 issue. But before I get into that, the full scope of the
10:01:17 6 word "prevent," putting aside the specification, which
10:01:23 7 I'll get into, putting aside the prosecution history,
10:01:25 8 which I'll get into, I think it's pretty clear that you
10:01:30 9 can prevent something without doing something. You can
10:01:34 10 uproot, you can just not schedule something.

10:01:35 11 THE COURT: All right. I get that.

10:01:37 12 MR. SUMMERS: Okay.

10:01:38 13 THE COURT: I will tell you, though, I still find
10:01:41 14 preventing communication to be more of an affirmative act
10:01:43 15 than without allowing communication.

10:01:46 16 MR. SUMMERS: Well, I certainly think that there
10:01:49 17 is more room for disagreement. So without allowing
10:01:53 18 clearly to not do something doesn't mean to do something.
10:01:57 19 So I think your Honor and I are on -- and Match are on the
10:02:00 20 same page on that. So I'd like to focus on this prevent
10:02:04 21 aspect.

10:02:06 22 And one thing I don't believe your Honor has a
10:02:08 23 copy of our slides.

10:02:09 24 THE COURT: I don't.

10:02:10 25 MR. SUMMERS: Before I get into that, maybe we'll

10:02:12 1 pass those up.

10:02:44 2 Okay. Your Honor, and so, I'm on -- this is

10:02:47 3 slide 26, and this is a more fulsome showing of what

10:02:53 4 actually happened in the prosecution history.

10:02:56 5 THE COURT: I like that word. I use "fulsome" a

10:02:59 6 lot.

10:03:01 7 MR. SUMMERS: Well, I'll be sure to note to use

10:03:02 8 it more often, at least in this case.

10:03:05 9 So what actually happened here -- so the Janssens

10:03:12 10 reference is something -- to go back to Mr. Caldwell's

10:03:15 11 kind of high level overview, how this invention works is

10:03:20 12 you start and you can't talk to anybody, and then, people

10:03:24 13 indicate preferences, and under one scenario, when two

10:03:28 14 people say yes, then you can communicate.

10:03:33 15 The Janssens reference, unlike how Tinder just

10:03:37 16 generally works and unlike the disclosures in the patent,

10:03:42 17 the Janssens reference didn't have that, you know, you

10:03:45 18 have to mutually opt in to speak. You could speak at any

10:03:50 19 time. And then, there was, you know, specific, additional

10:03:53 20 ways that you could potentially speak if there was a

10:03:57 21 match, there was a different part of Janssens. It's the

10:04:02 22 speed-dating part where throw you -- you know, throw you

10:04:05 23 into a chat with somebody else and you'd have 30 seconds

10:04:09 24 or something -- I don't know what the time is -- but then,

10:04:12 25 it would turn off.

10:04:14 1 And so, we're talking about the examiner's
10:04:17 2 initial rejections. And what Match said when we were
10:04:23 3 using this enabling and disabling communication language
10:04:27 4 that Bumble was arguing so heavily about, we say Janssens
10:04:34 5 suggests that users can freely communicate unless they are
10:04:38 6 prevented once a user requests. This teaches away from
10:04:43 7 the claimed manner of enabling and disabling
10:04:47 8 communications as users are prevented from communicating
10:04:51 9 until the conditions specified in the claim are met.

10:04:56 10 So what we were saying there is, as claimed in
10:05:04 11 this enable initial communication upon mutual positive
10:05:07 12 preference, prevent communication if there's not a mutual
10:05:11 13 positive preference, we specifically argued, our claimed
10:05:16 14 manner is that users are prevented from communicating
10:05:21 15 until the conditions specified in the claim are met. And
10:05:23 16 so, what that's referring to the mutual positive
10:05:27 17 preference for enabling an initial communication.

10:05:30 18 It's not saying that there's an affirmative step
10:05:32 19 later in the claim that you start with no communication
10:05:36 20 and then, you enable initial communication for these two
10:05:39 21 people, and then, you reach out, you perform an
10:05:42 22 affirmative act as to these two people. We're
10:05:44 23 specifically saying there's no communication until there
10:05:47 24 is upon this one specific condition.

10:05:51 25 Again, as you go on to the bottom, the claimed

10:05:55 1 manner of enabling and disabling communication requires a
10:06:00 2 particular set of factors to allow for communication
10:06:03 3 between users. So there was never -- never in the
10:06:07 4 prosecution history did Match ever say what we mean by
10:06:12 5 prevent is disable. And certainly never what we mean by
10:06:18 6 prevent in the context of, you know, between the first
10:06:22 7 user and the second user enable an initial communication
10:06:26 8 and then, the first user and the third user prevent
10:06:29 9 communication. There's never anything that says --
10:06:32 10 anything even arguably that that prevent means the server
10:06:35 11 has to reach out and do something.

10:06:38 12 And I think to make this clear, it's worth
10:06:42 13 looking at figure 10, which, you know, in Bumble's brief,
10:06:47 14 they say, well, you know, in this bottom right, it says do
10:06:50 15 not allow communication, and that's a step and you have to
10:06:53 16 perform it and that there's no default in this figure.
10:06:57 17 But there has to be a default in the figure. You either
10:07:01 18 can communicate or you can't.

10:07:03 19 And so, what this figure is showing is, you have
10:07:09 20 allow communication and do not allow communication.
10:07:13 21 Before you start the flowchart, you either can or you
10:07:15 22 can't. In the context of what we said in the prosecution
10:07:19 23 history and, you know, Mr. Drayton showed all those
10:07:24 24 disclosures about mutual positive preference, then you
10:07:27 25 enable direct communication between two users. What

10:07:32 1 that's showing is very clearly that in this flowchart as
10:07:36 2 between whether communication is on at the beginning or
10:07:39 3 whether it's off at the beginning, you know it's off. And
10:07:44 4 then, when you know it's off at the beginning, you can go
10:07:46 5 through all the flowcharts, and you can realize that,
10:07:50 6 okay, on one specific condition where the first user likes
10:07:54 7 the second user and the second user likes the first user,
10:07:58 8 then you allow communication; otherwise, you don't.

10:08:03 9 And the other part of this slide that I think
10:08:07 10 really makes clear that an affirmative act requirement
10:08:10 11 would just be -- it's just not what's disclosed here is,
10:08:16 12 it talks about what happens when the first user likes the
10:08:22 13 second user and the second user hasn't done a thing.
10:08:27 14 Hasn't even logged in. And it goes down to this do not
10:08:30 15 allow communication issue.

10:08:33 16 And so, the idea that it would perform an
10:08:36 17 affirmative act when one person has said yes and the other
10:08:39 18 person hasn't said anything, that no one would design a
10:08:43 19 system that way. A skilled artisan wouldn't look at the
10:08:47 20 specification's teachings, wouldn't look at the
10:08:50 21 prosecution history and think that anybody designed a
10:08:52 22 system that way.

10:08:54 23 And that's particularly true when you go back to
10:08:57 24 the claim language, and every time the word "prevent" is
10:09:01 25 used, it's in a claim that says determining to enable

10:09:05 1 initial communication between the first user and the
10:09:07 2 second user, and then, when it uses the term "prevent," it
10:09:11 3 says, preventing communication between the first user and
10:09:14 4 the third user after a negative preference, right?

10:09:20 5 So every time you recite enable initial
10:09:23 6 communication, you know that the first user and the second
10:09:27 7 user can't speak because you say enable initial
10:09:32 8 communication. That obviously would tell the skilled
10:09:36 9 artisan, well, if we're enabling initial communication,
10:09:41 10 communication is not initially enabled. And so, since the
10:09:45 11 full scope of the meaning of the word "preventing," you
10:09:50 12 know, can include maintaining a default, or something like
10:09:53 13 that, we just don't think the affirmative act construction
10:09:58 14 which would certainly give fertile ground for arguments
10:10:03 15 of, well, no, maintaining a default is not an affirmative
10:10:08 16 act, that that would be inappropriate.

10:10:14 17 One thing I just -- I do want to note to make
10:10:17 18 sure it's not lost in the weeds here and I know, you know,
10:10:21 19 the intrinsic evidence is the most important thing, but
10:10:25 20 Bumble did retain an expert, Mr. Schmandt, and he --

10:10:30 21 THE COURT: You don't need to spend a lot of time
10:10:32 22 on that.

10:10:32 23 MR. SUMMER: Okay. I just --

10:10:33 24 THE COURT: Or any time.

10:10:33 25 MR. SUMMERS: Thank you, your Honor.

10:10:40 1 MR. DRAYTON: Do I now, your Honor?

10:10:42 2 THE COURT: Yes. Please. Of course.

10:10:44 3 MR. DRAYTON: So, your Honor, the first thing
10:10:53 4 that I've heard throughout the presentation today is talk
10:10:57 5 about their product. Their product is obviously, as we
10:10:59 6 know, totally irrelevant to the claim construction
10:11:02 7 process.

10:11:03 8 THE COURT: But it's interesting.

10:11:04 9 MR. DRAYTON: It's interesting and so is our
10:11:06 10 client's product. But nonetheless. And so, they talk
10:11:09 11 about this concept of default. And it seems to be Match's
10:11:16 12 position that the claims require some kind of default
10:11:19 13 position, and I thought about this a lot and the claims
10:11:24 14 don't require a default position at all. It -- basically
10:11:30 15 when you read the specification, there are multiple ways
10:11:34 16 to enable communication between users, that is part of the
10:11:40 17 matching system.

10:11:40 18 So mutuality among two people is not the only way
10:11:44 19 to enable communications. So that is just -- that premise
10:11:53 20 is contradicted by the specification when you read about
10:11:57 21 the matching system. And figure 10 is part of that
10:12:01 22 matching system. Figure 10 is just an algorithm, one
10:12:07 23 aspect that is disclosed. And I want to go to figure 10
10:12:12 24 for a second and answer one question, or at least respond
10:12:15 25 to one remark. And here's figure 10.

1 And so, in figure -- in the claims, they don't
2 talk about in the claims, a user that doesn't say no. The
3 claims have two examples: Users that say yes and users
4 that say no. And so, the concept of what goes on in this
5 black box of do not allow communication, what we focused
6 on in the intrinsic record is what is related to the claim
7 limitations, plural -- limitations, plural, that are in
8 the asserted claims.

9 There is not a limitation in the claims to the
10 extent that someone doesn't make a choice. That's not in
11 the claims. So that's why we focused on the two areas of
12 the specification that talk about not allowing
13 communication.

14 And I think that puts in context that you can
15 have multiple ways of enabling communication. To the
16 extent that a person does not want to be matched, then the
17 system must prevent communication, it disables always a
18 communication. And so, that's how we read the claim based
19 upon the specification and the prosecution history. So I
20 did want to point that out to your Honor.

21 The other thing is the black box, in my opinion,
22 is what's described in the claim, in the specification.
23 And we've shown that to your Honor, so I won't repeat
24 that. I will note one thing about initial communication.
25 That is not at play. That's the last step to try to have

1 the patent invalid in the patent office when they were
2 trying to overcome Janssens.

3 So the concept of preventing communication was
4 actually inserted and put into play when it didn't say
5 initial -- determine to enable initial communications. So
6 I do think that's a fine point. I think it's relevant to
7 how you interpret the claim "preventing communications."
8 But either way, it still works, your Honor, when you read
9 the claims in light of the specification, in light of the
10 prosecution history.

11 The other point that I think is important is this
12 "without allowing." And so, the reason that "without
13 allowing" and "preventing" have the same support in the
14 specification, and it's Bumble's position that that
15 support was characterized by the patentee during the 811
16 prosecution history. And then, after they do research on
17 our product, sue us in court, they filed new claims, and
18 they file them with purpose.

19 THE COURT: I've seen it happen.

20 MR. DRAYTON: Right. So that's the "with
21 allowing," right, "without allowing." And it's almost an
22 identical claim and the patent office -- and that's what
23 this slide that we showed you and it's -- I'm getting old,
24 your Honor -- 36.

25 THE COURT: Thirty-six is not old.

10:15:39 1 MR. DRAYTON: Right. I'm not 36. I wish I was
10:15:41 2 36. But at any rate, that's when the patent said it's the
10:15:45 3 same invention and put it side-by-side and put in italics
10:15:50 4 "prevent" and put in italics "without."

10:15:52 5 And then, this is about public notice because
10:15:55 6 what is Bumble going to do, what do the other competitors
10:15:58 7 do when they look at this, right? They look at the
10:16:01 8 claims, they look at the prosecution history, they look at
10:16:03 9 the specification. And that's why we say that disable
10:16:06 10 language and how they characterize "not allow" applies to
10:16:11 11 "without allowing" as equally as it allows to prevent it.
10:16:15 12 You can't change your mind midstream when you've given
10:16:20 13 public notice like that.

10:16:21 14 And so, your Honor, those are the points I wanted
10:16:23 15 to emphasize. Thank you.

10:16:25 16 THE COURT: Anything else?

10:16:29 17 MR. SUMMERS: Thank you. Just two quick points,
10:16:34 18 your Honor, on this "without allowing" term on disclaimer
10:16:40 19 issue. And it's not on the screen anymore, but that's an
10:16:44 20 entirely circular argument.

10:16:46 21 What Mr. Drayton just said is without allowing
10:16:51 22 has to mean preventing because the examiner thought they
10:16:55 23 were the same thing. It is much more likely, in light of
10:17:01 24 how we described it in the 811 patent and in the intrinsic
10:17:04 25 evidence, that the examiner actually recognized as a

1 skilled artisan would that preventing in the context of
2 the claims in the 811 patent was not an affirmative act,
3 was similar to without allowing, and so, that's why there
4 was a terminal disclaimer.

5 In terms of changing the language, you know,
6 people do that because they know the kinds of arguments
7 that accused infringers are going to make. And so --
8 well, we'll be real sure on this one, even though we're
9 right on this other one. And so, at the end of the day,
10 that's all that was.

11 And I just want to -- if I could go back to
12 plaintiff's slides, please. I want to go to Mr. Drayton's
13 point about, you know, there are a lot of ways to enable
14 initial communication in the spec. What does the claim
15 say? Enable initial communication in response to
16 determining that both the first user has expressed the
17 positive preference indication regarding the second user
18 and the second user --

19 THE COURT: Slow down.

20 MR. SUMMERS: Oh, sorry.

21 THE COURT: Say that again, please.

22 MR. SUMMERS: In response to determining that
23 both the first user has expressed the positive preference
24 indication regarding the second user and the second user
25 has expressed the positive preference indication regarding

10:18:20 1 the first user.

10:18:21 2 So the claim says, enable initial communication
10:18:26 3 in response to a mutual positive preference. When you
10:18:29 4 look at the flow chat and how it has to be on or off, the
10:18:34 5 claim indicates very clearly that as between the first and
10:18:38 6 second user, it has to start off. And given the full
10:18:42 7 scope of the meaning of the word "prevent," a skilled
10:18:45 8 artisan would look at that and say, oh, okay, that can be
10:18:47 9 met because the system was designed to start with off and
10:18:51 10 if you don't turn it on, it's prevented.

10:18:55 11 Thank you, your Honor.

10:18:56 12 THE COURT: Anything else?

10:18:57 13 MR. DRAYTON: I just want to clarify one thing,
10:18:59 14 your Honor.

10:18:59 15 THE COURT: Anything.

10:19:00 16 MR. DRAYTON: So I didn't say that there was -- I
10:19:02 17 didn't think I said, anyway. You never know what you say.
10:19:05 18 But the specification talks about multiple ways of
10:19:08 19 enabling communication between two users. I did not
10:19:11 20 say --

10:19:11 21 THE COURT: I didn't hear you say that.

10:19:12 22 MR. DRAYTON: Right. Okay.

10:19:13 23 And then, the other thing that I think is
10:19:15 24 important is, there's a focus on this figure. And what
10:19:19 25 Bumble is focused on is the claims in light of the

10:19:22 1 specification and the prosecution history, not just that
10:19:25 2 figure 10.

10:19:26 3 THE COURT: I got it.

10:19:27 4 MR. DRAYTON: Thank you, your Honor.

10:19:28 5 THE COURT: Okay. We're going to take a five,
10:19:50 6 10-minute recess. We'll be back around 10:30 and I'll
10:19:54 7 have a -- I'll tell you what I'm going to do on those
10:19:56 8 claim terms. And then, we just have two claim terms left,
10:19:59 9 correct?

10:19:59 10 MR. DRAYTON: Yes, your Honor.

10:20:00 11 THE COURT: Okay. So we're -- no rush. But did
10:20:05 12 y'all have anything else you wanted to say on this
10:20:07 13 particular claim here?

10:20:10 14 MR. DRAYTON: No, your Honor.

10:20:10 15 MR. SUMMERS: Nothing further.

10:20:11 16 THE COURT: Okay. Good. Thanks.

10:26:59 17 (Recess.)

10:29:29 18 THE COURT: Do y'all have another copy of your
10:29:35 19 PowerPoint? I can have someone run back to the office if
10:29:39 20 y'all don't. Thanks.

10:29:50 21 The Court is going to define for the claim terms
10:29:52 22 of "preventing communication" and "without allowing
10:29:59 23 communication" that there's no construction needed. Plain
10:30:04 24 and ordinary meaning will be acceptable. What I mean by
10:30:06 25 that, however, is what I anticipate happening is

10:30:11 1 defendants making -- in terms of infringement and
10:30:14 2 invalidity arguments, I'm not telling you that you can't
10:30:19 3 make the arguments you made with respect to the proposed
10:30:23 4 claim terms you had on the basis that you did, but I'm not
10:30:29 5 going to use those as claim constructions.

10:30:37 6 And the plaintiff is free to argue there's
10:30:39 7 infringement and the patents are valid based on your
10:30:43 8 understanding of what an expert would say a person skill
10:30:49 9 in the art would believe "without allowing communication"
10:30:52 10 and "preventing communication" means.

10:30:53 11 Moving on to the next claim term of "social
10:30:57 12 networking platform." I have to say, I have a hard time
10:31:07 13 believing this one needs to be construed, either.
10:31:09 14 However, I look forward to having someone try to persuade
10:31:15 15 me. Whose job is that?

10:31:19 16 MR. DRAYTON: Ms. Whelan.

10:31:23 17 THE COURT: They must not like you if they gave
10:31:26 18 you this claim term.

10:31:29 19 MS. WHELAN: Good morning, your Honor.

10:31:37 20 So just quickly to address your Honor's concern
10:31:41 21 about why this claim term needs to be construed. The
10:31:46 22 reason it needs to be construed is because within the
10:31:49 23 context of the claim, social networking platform is
10:31:56 24 ambiguous, and it's actually plaintiff's interpretation of
10:31:59 25 it in the infringement contentions that has introduced

10:32:02 1 that ambiguity in the claim. So Bumble would propose a
10:32:06 2 construction of social networking platform independent of
10:32:08 3 the system for social -- for file matching.

10:32:11 4 And I think an important point is that Bumble's
10:32:14 5 not tied to the specific word "independent." There is
10:32:16 6 other words such as the "distinct," "different from," "not
10:32:19 7 coextensive with" that would express the same principle.

10:32:23 8 And the reason why it's important to construe
10:32:27 9 this term is that the way that plaintiffs are interpreting
10:32:30 10 it in the claim -- in their infringement contentions
10:32:34 11 really would render the term "social networking platform"
10:32:43 12 superfluous and meaningless. And as your Honor knows,
10:32:46 13 claim construction that gives meaning to all the claims of
10:32:49 14 the term is preferred.

10:32:50 15 THE COURT: But how is -- when you start off by
10:32:53 16 saying that, how -- your construction for social
10:33:00 17 networking platform is telling me what it -- I think where
10:33:09 18 we have an issue here is, I have a fundamental, I guess,
10:33:12 19 disagreement with what I think a claim construction
10:33:17 20 Markman hearing is supposed to be. I think what you want
10:33:24 21 to tell me is -- and I get why. You think that what they
10:33:29 22 say infringing is is incorrect, but you're not really
10:33:33 23 construing social networking platform here.

10:33:38 24 Your construction is social networking platform
10:33:41 25 independent of the system for profile matching. In other

10:33:44 1 words, you're trying to put a limitation on what social
10:33:51 2 networking platform is. You're not construing it in my
10:33:52 3 opinion.

10:33:53 4 MS. WHELAN: Well, your Honor --

10:33:54 5 THE COURT: It seems to me like this is a motion
10:33:58 6 for summary judgment, not a claim that your motion for
10:34:04 7 summary judgment or your engineer's argument ought to be
10:34:07 8 the plaintiffs got it wrong, the way they used social
10:34:12 9 networking platform, because a social networking platform
10:34:14 10 is this or that. And I don't see how when I tell the jury
10:34:23 11 -- I can't imagine you explaining someone when they say,
10:34:26 12 oh, I don't know what social networking platform is.
10:34:28 13 Actually, sadly for you in this particular argument, even
10:34:32 14 I know what a social networking platform is, which means
10:34:37 15 it's harder for you to make this argument. Even at 60, I
10:34:42 16 know what a social networking platform is.

10:34:45 17 And so, it seems to me that you're not really
10:34:50 18 construing social networking platform with your proposed
10:34:54 19 construction. You're trying to limit what they say a
10:34:59 20 social networking platform can be or how it can function,
10:35:04 21 and that's not the purpose -- that may be fine and I'm not
10:35:07 22 expressing, again, anything about whether there's
10:35:10 23 infringement or not.

10:35:11 24 You may make this argument at summary judgment or
10:35:15 25 on infringement and win, but I don't think the role of --

10:35:19 1 and I'm not lecturing you as much as just trying to help
10:35:22 2 you out why I'm -- where I'm coming from is, it doesn't
10:35:27 3 explain what a social networking platform is to say that
10:35:31 4 the social networking platform is independent of the
10:35:34 5 system for profile matching.

10:35:36 6 MS. WHELAN: Well, your Honor, if you'd just
10:35:39 7 permit me to talk briefly about the claim.

10:35:42 8 So I think our point would be is that the context
10:35:46 9 of the claim itself makes clear that the social networking
10:35:51 10 platform is distinct from the system for profile matching.
10:35:54 11 So we're not trying to add anything into the claim. We're
10:35:57 12 just simply trying to give meaning to all the terms in the
10:36:00 13 claim.

10:36:02 14 In addition, you'll see that claim 7 of the 811
10:36:07 15 patent requires that the system for profile matching
10:36:10 16 electronically receive a plurality of online dating
10:36:14 17 profiles and that those profiles must each be associated
10:36:18 18 with a social networking platform. And the way that
10:36:22 19 plaintiffs are trying to read the claim is -- just
10:36:25 20 wouldn't make any sense because if a social networking --
10:36:30 21 if the system for profile matching is receiving online
10:36:33 22 dating profiles that are associated with the social
10:36:37 23 networking platform, but the system for profile matching
10:36:39 24 itself could be the social networking platform, it just
10:36:42 25 wouldn't make sense because when they're received, if they

10:36:45 1 became part of the -- associated with the social
10:36:51 2 networking platform by virtue of being received, it would
10:36:54 3 essentially render that term meaningless.

10:36:55 4 THE COURT: Again, your problem is, your
10:36:57 5 predicate doesn't help me because I don't know how they're
10:37:00 6 doing it. I haven't read their infringement contentions.
10:37:04 7 I don't know whether they're right or wrong. I don't
10:37:06 8 think that's a role I would even have at this point. It
10:37:11 9 seems to me, if -- again, I'm trying to help you out here.
10:37:15 10 If you want to tell me that you want to construe social
10:37:21 11 networking platform, I invite you to do that.

10:37:23 12 But to say social networking platform means
10:37:28 13 social networking platform independent of the system for
10:37:32 14 profile matching, all that tells me you're doing is
10:37:34 15 putting a restriction on the use of the phrases "social
10:37:41 16 networking platform." You're not construing it. You're
10:37:43 17 not offering me, in my opinion, a construction, and if you
10:37:48 18 can, I invite you to do that.

10:37:50 19 But I'm not very open to persuasion that what you
10:37:53 20 guys are suggesting here is a construction for social
10:38:00 21 networking platform. It is a limitation on the way you
10:38:02 22 guys think it can be used. You can use that down the
10:38:06 23 road. But I don't know how or why -- I don't even think I
10:38:11 24 would have the power -- everyone tells me I could do
10:38:14 25 whatever I want. Not that kind of I can do what I want.

10:38:17 1 But I don't think in terms of what my real role
10:38:19 2 as a -- trying to construe the claim term, I don't see how
10:38:24 3 yours accomplishes it. Let me give you one more chance to
10:38:27 4 persuade me.

10:38:28 5 MS. WHELAN: Sure. Well, I think that a case
10:38:32 6 General American Transportation Corp that we cited in our
10:38:34 7 brief is actually quite instructive here. So in that
10:38:38 8 case, the claim term was openings through said ceiling
10:38:44 9 means adjacent to each of the said side walls and end
10:38:46 10 walls. And in that case, the court determined that the
10:38:52 11 claim language itself suggested that the openings adjacent
10:38:55 12 to the side walls and the end walls were structurally
10:38:58 13 distinct.

10:38:59 14 We see that as analogous to the claim term here
10:39:02 15 because the claim term here also suggests that the social
10:39:07 16 networking platform is distinct from the system for
10:39:10 17 profile matching. And so, the Court rejected a
10:39:15 18 construction that was inconsistent with the specification
10:39:19 19 and the drawings and renders superfluous the claim
10:39:21 20 requirement that the openings were adjacent to the end
10:39:24 21 walls.

10:39:24 22 I think that the doctrine of claim
10:39:27 23 differentiation is also very instructive here. If you
10:39:32 24 look at claims 4 and 5 of the 854 patent, in that claim,
10:39:37 25 it's actually the term "a social networking platform"

10:39:40 1 appears only in the dependent claim. In the independent
10:39:44 2 claim, it was directed to that system for profile
10:39:48 3 matching.

10:39:48 4 Now, under the doctrine of claim differentiation,
10:39:52 5 if social networking platform wasn't distinct from the
10:39:58 6 system for profile matching, which we believe the
10:40:00 7 structure of the claim itself already includes that
10:40:02 8 limitation, then claim 5 would essentially be not add any
10:40:07 9 additional limitation which would be contrary to the
10:40:12 10 patent statute, which requires that dependent claims
10:40:15 11 actually provide a further limitation.

10:40:18 12 And I won't belabor the point, but I'd also just
10:40:25 13 point out that the specification consistently talks about
10:40:30 14 the social networking platform and the matching server as
10:40:33 15 two distinct entities. Although they may interact with
10:40:36 16 each other, they are always discussed as distinct. For
10:40:42 17 example, they have to interact through an application
10:40:44 18 programming interface. As I mentioned before, your Honor,
10:40:46 19 there is some ambiguity here about what this claim term
10:40:49 20 means. And so, we think it's appropriate to look at the
10:40:51 21 specification in this case.

10:40:52 22 THE COURT: Okay. Thank you. I'm good. I'm
10:41:02 23 going to do a plain and ordinary meaning.

10:41:05 24 MR. SUMMERS: Thank you, your Honor.

10:41:06 25 THE COURT: And the final claim term is

10:41:10 1 "associated."

10:41:16 2 MR. CALDWELL: Does your Honor have a preference
10:41:17 3 who you hear from on "associated"?

10:41:19 4 THE COURT: I am looking forward to hearing at
10:41:23 5 60 -- at the age of 60 why I need to know what the word
10:41:28 6 "associated" -- why it needs to be construed. So I'm --

10:41:33 7 MR. CALDWELL: I'll probably sit down.

10:41:33 8 THE COURT: I'm going to give the defendant an
10:41:35 9 opportunity to explain that to me.

10:41:38 10 MR. CALDWELL: Thank you.

10:41:39 11 MS. WHELAN: So moving on to "associated," so
10:41:51 12 defendant's position is that the claim term does not need
10:41:53 13 to be construed and, in fact, cannot because the claim
10:41:56 14 term is indefinite. And now, what's unique about this
10:42:02 15 case is that associated is pervasive throughout the
10:42:05 16 claims. For example, in claim 1 of the 023 patent, it
10:42:08 17 appears nine times alone.

10:42:11 18 In fact, throughout the three patents, there is
10:42:13 19 14 different ways and -- or contexts in which this claim
10:42:17 20 is used. So the patent doesn't provide notice of how the
10:42:22 21 elements that are connected with associated are actually
10:42:27 22 connected. There's no plain consistent meaning in the
10:42:31 23 contexts of the claims that fits for associated here, and
10:42:36 24 the intrinsic evidence here is not helpful.

10:42:39 25 You may have noted in plaintiff's briefs that

1 there was a kind of laundry list of intrinsic evidence
2 that they contended was somewhat helpful in construing
3 associated, but they didn't really talk about how that
4 helped and that's not a coincidence. It wasn't helpful
5 because in those cases, either it didn't even relate to
6 the term "associated," the term "associated" wasn't used,
7 it was just used in the same manner as it was used in the
8 claim terms. Or it was -- the term "associated" was used
9 in a context that was not in the same context as it was in
10 the claims.

11 And this just does not fulfill the public notice
12 requirement. Juries and alleged infringers are given no
13 guidance about how the numerous elements in the claims
14 that are connected by associated are actually connected,
15 and it just doesn't provide reasonable certainty regarding
16 the scope of the invention.

17 Now, I think it's important to note that Match
18 has declined to provide a construction for associated,
19 either alone or in the context of the claims. Instead,
20 they point to the general dictionary definitions to say
21 that associated has a clear ordinary meaning, but that's
22 not really the point here. The question is whether the
23 claim is definite when the word "associated" is used, and
24 here, it's not.

25 And one thing that we noted is that associated

10:44:04 1 here has some sort -- implies some sort of measure or
10:44:09 2 degree. Kind of like the terms "about," "near" or
10:44:12 3 "proximate." All of those words have clear meaning, but
10:44:17 4 they lack sufficient precision when relied on to clearly
10:44:21 5 define what's inside and outside of the claim boundary.
10:44:24 6 And that's how we would see "associated" here.

10:44:28 7 Now, perhaps an attempt to get around this, Match
10:44:31 8 has pointed to just "associated" meaning any sort of
10:44:36 9 relationship between two elements. Essentially no matter
10:44:38 10 what relationship anyone can conjure between two elements,
10:44:42 11 it falls within the scope of the claim. But this fails to
10:44:46 12 draw a boundary line and renders the claim term
10:44:49 13 indefinite.

10:44:51 14 Now, we spent a lot of time in our brief talking
10:44:54 15 about a few specific terms.

10:44:55 16 THE COURT: Let me just suggest to you, I'm
10:44:59 17 looking at claim 1 in the final sentence -- the final line
10:45:05 18 of claim 1 is, storing the positive preference indication
10:45:11 19 associated with the first item of information in response
10:45:13 20 to detecting the gesture. When I read that, the word I
10:45:20 21 most likely -- I'm most likely to understand is
10:45:24 22 "associated" out of that whole line.

10:45:28 23 And as I've said before, one of my very closest
10:45:34 24 friends who was the technical lawyer I worked with the
10:45:36 25 most referred to my technical skills on patent cases as

10:45:39 1 that of being a dog watching a television. You know, he
10:45:43 2 can see the television's on, but he really can't figure
10:45:45 3 out what show is being played.

10:45:48 4 So I'm always cautious about these things, but I
10:45:57 5 have a really hard time -- I'm not getting there with
10:46:03 6 believing that I need to construe -- that the word
10:46:05 7 "associated" is indefinite. As I read through here, I
10:46:10 8 feel like -- and I'm not a person of skill in the art, but
10:46:15 9 a graphical representation of a first online dating
10:46:17 10 profile associated with the first user.

10:46:20 11 If I were reading that in preparation to
10:46:23 12 cross-examine an expert, I think I would know what that
10:46:26 13 means. I think I could ask him: Dr. Smith, tell me where
10:46:33 14 there's a gesture that's detected here that's associated
10:46:36 15 with the graphical representation, and I think he would
10:46:39 16 know what that means and I think the jury would know what
10:46:42 17 that means. I'm not -- I'm having a really hard time
10:46:47 18 saying that the word "associated" is indefinite. I'm not
10:46:53 19 getting there. So I'll give you a little bit more time,
10:46:56 20 but I'm not -- I'm not getting there.

10:47:00 21 MS. WHELAN: Sure. If you'll permit me, your
10:47:02 22 Honor, to talk about a couple of terms that we didn't
10:47:04 23 focus extensively on in the brief that I think are a good
10:47:07 24 illustration of why this claim term is indefinite.

10:47:09 25 The first term is a geographic location

10:47:12 1 associated with the first user. So it's unclear just
10:47:15 2 based on the use of the term "associated" what that
10:47:17 3 connection is. Is the first user within a certain
10:47:20 4 distance of the location? Does the first user reside at
10:47:23 5 the location? Did the first user work at the location?
10:47:27 6 Were they originally from the location?

10:47:28 7 THE COURT: I'm willing to bet you that if you
10:47:31 8 gave me an hour, I could find an expert at the University
10:47:38 9 of Texas who could read the patent in 15 minutes and give
10:47:41 10 me an answer to every one of those questions. Someone
10:47:47 11 who's skilled in the art. I don't know who you were
10:47:48 12 saying is skilled in the art here, but I am absolutely
10:47:51 13 certain I could find Dr. Somebody or one of their students
10:47:55 14 who would be able to answer every one of those questions
10:48:00 15 using the word "associated." It may or may not be right,
10:48:05 16 but it's not indefinite in my opinion.

10:48:11 17 So I'm going to find that the claim term is just
10:48:16 18 plain and ordinary meaning.

10:48:19 19 MS. WHELAN: Thank you, your Honor.

10:48:20 20 THE COURT: And I don't mean any disrespect. I
10:48:22 21 mean, I don't -- I don't think anyone else could have
10:48:25 22 persuaded me of that, either. So I thought you did a
10:48:27 23 great job, and I think coming up with something like that
10:48:32 24 is as persuasive as you're going to get. And maybe a
10:48:34 25 different judge would decide differently, but I think

10:48:37 1 associated is subject to understanding by a POSITA.

10:48:45 2 So let's turn to the motion. If someone could --

10:48:50 3 I have -- I've read the motion. I've read everything

10:48:53 4 about it. And so, who's going to take up arguing that?

10:48:59 5 MR. SUMMERS: Thank you, your Honor. John

10:49:08 6 Summers, again, for Match Group.

10:49:11 7 One administrative issue is, there are -- there

10:49:17 8 is some evidence cited in the brief that is not public

10:49:20 9 information. I haven't talked to Bumble or Mr. Caplan

10:49:24 10 about this, but I think that they might want the courtroom

10:49:27 11 to be sealed. So I'll let them speak on that.

10:49:31 12 THE COURT: Do we need to bring that up during

10:49:32 13 the hearing?

10:49:34 14 MR. CAPLAN: I don't think so, but that's his

10:49:36 15 call. If it's just about whether or not the Court's going

10:49:39 16 to consider the materials, we can do that without getting

10:49:42 17 into the substance of them. But I'm not sure if Mr.

10:49:45 18 Summers' argument is going to touch on the contents of

10:49:48 19 certain of the documents that have been sealed.

10:49:51 20 MR. SUMMERS: Your Honor, I would -- intend to

10:49:53 21 touch on those documents.

10:49:55 22 THE COURT: Why don't we go into -- when you get

10:49:58 23 to the point where you think you need to do that, let me

10:50:01 24 know.

10:50:01 25 MR. SUMMERS: Okay. Thank you, your Honor.

1 So the Match Group's motion to dismiss here kind
2 of has two large facets, as the Court is aware of.
3 There's the issue of Bumble's most recent iteration of
4 their state law counterclaims and that's sort of the one
5 group, and then, there's the issue of the denial of
6 registration trademark counterclaims.

7 And so, I'll take the state law counterclaims
8 first. That is the issue that will potentially implicate
9 the confidential information, but I'll stop before I get
10 into --

11 THE COURT: I've read all -- I don't think you
12 need to go into what the information is.

13 MR. SUMMERS: Okay.

14 THE COURT: I'm pretty familiar with it. I'm
15 certainly familiar with anything you put in the brief.

16 MR. SUMMERS: Thank you, your Honor. Sure. If
17 there's anything I'll add, I'll be sure to let you know.
18 But, otherwise, I'll steer clear as much as I can.

19 So just as a reminder, the general state law
20 claims and these are just paragraphs from those
21 counterclaims. The theory is now that in January of 2018,
22 Match pretended to be -- excuse me, your Honor. Match
23 pretended to be interested in an acquisition. The
24 allegation is that they were not, in fact, interested in
25 the acquisition and the purpose of that was just to --

10:51:37 1 THE COURT: To delay.

10:51:39 2 MR. SUMMERS: To delay.

10:51:40 3 THE COURT: What I'm most interested in you
10:51:43 4 articulating specifically for me is -- and on the record
10:51:45 5 is what any affirmative -- anything that was affirmatively
10:51:54 6 stated by them that they -- that you relied on. Does that
10:52:01 7 make sense? That, you know, in other words, where it
10:52:08 8 shows they knew -- that they knew other offers were out.

10:52:14 9 MR. SUMMERS: Uh-huh.

10:52:15 10 THE COURT: And that their goal was -- that they
10:52:18 11 should be held liable, not just for not going through the
10:52:21 12 deal, which I don't think they could be found liable for,
10:52:24 13 but that they said something, did something. What were
10:52:30 14 the acts that they committed that you -- and they could
10:52:34 15 say there was -- didn't happen or they're wrong. But what
10:52:38 16 would you say they did that was -- that you all relied on,
10:52:46 17 to your detriment, in making the decision to believe that
10:52:49 18 they were going to go through and not to move forward with
10:52:52 19 other people?

10:52:53 20 MR. SUMMERS: Right. So I think Mr. Caplan will
10:52:55 21 probably answer the question of what Bumble believes that
10:53:01 22 Match told them that they relied on. But in terms of --

10:53:04 23 THE COURT: Yeah. I have that backwards. Yeah.

10:53:06 24 MR. SUMMERS: In terms of what the pleadings say,
10:53:08 25 it's all about you said you were interested. You told us

10:53:13 1 you were looking at this due diligence. You indicated
10:53:19 2 that you were preparing a higher offer. Those are --
10:53:23 3 that's all that is there.

10:53:26 4 And so, in terms of what that reliance is, you
10:53:29 5 can characterize it differently. You can say, well, we
10:53:31 6 relied on, you know, the fact that you didn't tell us that
10:53:34 7 you weren't interested, or we relied on something like
10:53:37 8 that. But what the actual action they took in reliance on
10:53:42 9 these statements, that reliance is reliance that a deal
10:53:47 10 would go through. When you don't go through with another
10:53:50 11 deal and you wait on this.

10:53:51 12 THE COURT: Right.

10:53:52 13 MR. SUMMERS: That reliance is that a deal would
10:53:54 14 not go through.

10:53:55 15 One thing I would like to touch on, your Honor,
10:53:57 16 before we get into the merits is this subject matter
10:54:01 17 jurisdiction --

10:54:01 18 THE COURT: Yes, sir.

10:54:02 19 MR. SUMMERS: -- issue.

10:54:03 20 THE COURT: Okay.

10:54:04 21 MR. SUMMERS: Because I just didn't want to get
10:54:07 22 past that.

10:54:09 23 So on the supplemental jurisdiction, we talked
10:54:12 24 about this a little bit in February over the different
10:54:19 25 state law counterclaims. And just as a reminder, the

1 first iteration of these state law counterclaims were that
2 Match filed a bogus lawsuit.

3 THE COURT: Y'all have squared away on that.

4 MR. SUMMERS: Those are gone. Yes, your Honor.

5 Match filed a bogus lawsuit and that Match, you
6 know, made similar representations for purposes of
7 acquiring Bumble confidential information. Both of those
8 claims are gone. It's in the 18-CV-350 case that is a
9 final judgment, closed.

10 These claims don't have that. There's nothing
11 that the patent lawsuit is frivolous. There's nothing
12 that the patent lawsuit is wrong. There's nothing that we
13 misappropriated trade secrets. And that's important
14 because those counterclaims raised federal questions or at
15 least were interrelated with the federal questions, and
16 now, it's just not there anymore.

17 And so, even if, you know, there were some
18 efficiency benefits for doing everything in federal court,
19 just as an academic notion, the Court doesn't have
20 authority because there's no nexus here. I think the
21 AngioScore case that we cited pretty lengthily in our
22 brief kind of sets forth the narrowness of supplemental
23 jurisdiction in kind of the intellectual property context.

24 So the patent case depends on how Bumble works.
25 The trademark case depends on, you know, their using the

1 marks and whether there's likelihood of confusion. Our
2 trade secret case depends on whether they took the
3 business idea and what they've done with it. That has
4 nothing to do with the acquisition discussions. There's
5 just no -- there's no operative fact. They're not going
6 to prove their claims. They would not have to offer
7 evidence of anything related to the 18-CV-80 lawsuit,
8 which is -- actually when we were litigating this issue in
9 the 18-CV-350 case, Bumble actually specifically said that
10 these exact state law counterclaims had no nexus at all
11 with the 18-CV-80 case.

12 THE COURT: And I should know this and I don't.
13 Is there no diversity between the parties?

14 MR. SUMMERS: There's no -- not complete
15 diversity between the parties. Yes.

16 THE COURT: Okay. Well, on -- are you done on
17 that subject?

18 MR. SUMMERS: On that subject, yes, your Honor.

19 THE COURT: Let me hear from opposing counsel on
20 that particular subject.

21 MR. SUMMERS: Okay. Thank you, your Honor.

22 THE COURT: Yes, sir. Good morning.

23 MR. CAPLAN: Good morning, your Honor. Matt
24 Caplan on behalf of Bumble Holding and Bumble Trading.

25 With respect to subject matter jurisdiction, I

1 think there's a few things to consider. The first is,
2 when we were litigating this issue in the context of the
3 separate action, the question there that Bumble was taking
4 was, if we had filed these new claims in Texas state
5 court, there would not be original jurisdiction in federal
6 court because there was no federal claims raised by what's
7 currently including the counterclaims here, nor was there
8 complete diversity. Supplemental jurisdiction isn't a
9 basis to remove a case.

10 Match, at the same time, was arguing that there
11 was supplemental jurisdiction over these exact claims.

12 THE COURT: To get them into federal court.

13 MR. CAPLAN: To get them into federal court. And
14 that was part of their opposition of our motion for leave
15 to file these exact claims in state court. So that's the
16 position that they had previously taken in this
17 litigation. We were arguing that there wouldn't be
18 original jurisdiction over these claims. So I think in
19 fairness to the decision that was made in the prior case
20 to file these here, Match had already staked out the
21 position that these should be heard together.

22 And in terms of the authority of this court to
23 hear these using the supplemental jurisdiction statute, we
24 cited to a Supreme Court case, United Mine Workers, and at
25 725 in that case, they talk about how it's important to

1 consider the context of the entire litigation and the
2 relationship between the parties in deciding whether or
3 not a federal court can exercise subject matter
4 jurisdiction.

5 And what they said that if it's such that you
6 would ordinarily expect to have all of those claims heard
7 and tried together, then the federal court has power under
8 the supplemental jurisdiction statute to do that. I think
9 that's exactly what we have here. Match has filed a
10 wide-ranging complaint against Bumble that includes a
11 variety of different claims against them, and some of them
12 do reach beyond patent and trademark issues. They have a
13 trade secret claim that essentially puts Bumble's entire
14 operations at issue in this case, and that reflects
15 essentially the relationship between the parties and that
16 is exactly what these counterclaims also address.

17 THE COURT: Do you realize that if I go in your
18 direction, it's your company that's at peril of me getting
19 it wrong? Because they get to raise this on appeal.

20 MR. CAPLAN: Yes. I do, your Honor. And I
21 understand that the parties via our agreement cannot
22 consent to subject matter jurisdiction. I know it's a
23 decision that you have to make. And Bumble is prepared to
24 accept that if you exercise subject matter jurisdiction of
25 the counterclaims, understanding that it's an appealable

10:59:42 1 issue.

10:59:43 2 THE COURT: Counsel, do you have anything you'd
10:59:46 3 like to add?

10:59:50 4 MR. SUMMERS: Very briefly, your Honor.

10:59:54 5 The law is clear that just having a business
10:59:59 6 relationship or a commercial relationship for two
11:00:02 7 companies being in a dispute with one another is -- that
11:00:06 8 doesn't provide the operative fact that you have to have a
11:00:11 9 nexus between.

11:00:14 10 I don't want to go too much into the cases, but
11:00:16 11 this AngioScore case, to go into the facts, it was the two
11:00:22 12 claims were patent infringement of this device called the
11:00:27 13 chocolate device and it was a medical device, and then,
11:00:30 14 there was a state law claim of loss of corporate
11:00:34 15 opportunity, and the corporate opportunity was the
11:00:38 16 chocolate device. And the Federal Circuit reversed after
11:00:42 17 a jury verdict and said, there was no common nucleus of
11:00:48 18 operative fact because even though there was this
11:00:51 19 relationship between the chocolate device and how it
11:00:53 20 worked and how valuable it was, that the patent
11:00:58 21 infringement aspect just depended on whether or not the
11:01:00 22 claims, the corporate opportunity aspect of it depended on
11:01:04 23 whether it was a corporate opportunity.

11:01:05 24 And so, that reflects that, you know, even
11:01:10 25 facially close circumstances don't necessarily have a

11:01:16 1 nexus if what you have to prove doesn't link up.

11:01:21 2 THE COURT: Okay.

11:01:22 3 MR. SUMMERS: And here, what you have to prove
11:01:24 4 doesn't link up. I think I addressed this point about the
11:01:27 5 Match's previous position.

11:01:28 6 THE COURT: No. You did.

11:01:30 7 MR. SUMMERS: There was a link there and that's
11:01:31 8 why there's a difference.

11:01:32 9 THE COURT: Okay. I'm not going to decide that
11:01:34 10 issue today, but you'll have a decision next week.

11:01:38 11 MR. SUMMERS: Okay. Thank you, your Honor.
11:01:39 12 Would you like me to continue on the other issues?

11:01:41 13 THE COURT: Sure. Yes. Uh-huh. You have next
11:01:44 14 up personal jurisdiction over IAC.

11:01:47 15 MR. SUMMERS: Yes, your Honor.

11:01:47 16 THE COURT: And I think I've -- I know I've
11:01:51 17 disclosed to you before, I think -- I can't be certain. I
11:01:54 18 think I had a case for IAC once, many years ago, and I
11:01:59 19 think we answered and it settled. I mean, I don't -- I
11:02:03 20 can't sufficiently even tell you if I -- I mean, I've
11:02:07 21 taken in consideration I don't think I have a conflict but
11:02:10 22 that's -- at some point, I know I had some relationship
11:02:16 23 with IAC, but it didn't go beyond, I think, maybe filing
11:02:20 24 an answer. I don't even remember if I filed an answer.

11:02:22 25 MR. CALDWELL: You did tell us, your Honor, and I

11:02:24 1 think the way that it played out was basically that
11:02:26 2 Bumble's side took a week, or something like that, to
11:02:29 3 figure out if they had any issue or were going to raise
11:02:31 4 any sort of issue, and then, everybody agreed there wasn't
11:02:34 5 a problem. I think you did raise before you had worked --

11:02:36 6 THE COURT: Okay. I just remembered again when I
11:02:38 7 saw IAC.

11:02:40 8 MR. CALDWELL: You definitely brought that to our
11:02:42 9 attention in Waco.

11:02:44 10 MR. DRAYTON: You did, your Honor. It was ten
11:02:45 11 years ago, you said, somewhere along those lines.

11:02:48 12 THE COURT: Right. It was a long time.

11:02:50 13 MR. DRAYTON: Right. There's no problem, your
11:02:51 14 Honor. Thank you.

11:02:51 15 THE COURT: Yeah. It was a long time ago. So at
11:02:56 16 any rate, I just want to put that on the record. So go
11:02:58 17 ahead with respect to IAC.

11:03:01 18 MR. SUMMERS: Thank you, your Honor.

11:03:01 19 So the issue here is that in these new
11:03:04 20 counterclaims, unlike previous counterclaims, Bumble has
11:03:08 21 added IAC, which is a majority owner in Match Group, Inc.
11:03:14 22 which is the sole owner of Match Group, LLC. So the
11:03:17 23 grandparent company of the Match Group, LLC.

11:03:21 24 And as to personal jurisdiction issue, there are
11:03:24 25 two non-conclusory allegations concerning IAC. One in

11:03:31 1 paragraph 63, IAC's CEO told Bumble's team that JP Morgan.
11:03:40 2 So didn't tell Bumble, told Bumble's team at JP Morgan
11:03:44 3 that it would support an acquisition. And in paragraph
11:03:47 4 67, 11, the CEO explained to JP Morgan, again, not Bumble,
11:03:53 5 that Match and IAC strongly desired additional due
11:03:59 6 diligence. Those are the only two actions other than kind
11:04:02 7 of inferential IAC and Match agreed to do all this, you
11:04:09 8 know, all this bad stuff. Those are the only two actions
11:04:12 9 that IAC is pleaded to have done.

11:04:17 10 And so, in terms of the specific jurisdiction,
11:04:20 11 there's general jurisdiction. We weren't totally sure
11:04:23 12 whether they were saying general or specific. I don't
11:04:27 13 think general jurisdiction is at issue. It shouldn't be
11:04:29 14 because that's a very stringent test. So the specific
11:04:33 15 jurisdiction is the only issue. And to get specific
11:04:37 16 jurisdiction over IAC, the contacts with the forum, not
11:04:42 17 with the Texas company, the contacts with the forum.

11:04:46 18 THE COURT: Are nonexistent.

11:04:47 19 MR. SUMMERS: Exactly. They're nonexistent. So
11:04:50 20 obviously the claim doesn't arise out of contacts with the
11:04:53 21 forum because there are no contacts with the forum. The
11:04:56 22 only arguable kind of point of law that Bumble can reach
11:05:03 23 back to is the Calder kind of effects test, which is
11:05:09 24 supposed to be a narrow test that if you specific -- you
11:05:12 25 can do something outside the forum if you specifically

1 directed to the forum and the claim arises out of that
2 direction to the forum, then there can be specific
3 jurisdiction. And there's just -- there's no "there"
4 there. IAC made representations not in Texas concerning
5 an acquisition which -- and this goes into -- that doesn't
6 necessarily involve only the Texas company or primarily
7 the Texas company.

8 So there are cases about tortious interference
9 and what you need to know and how you can do acts outside
10 the forum that are directed to the forum. But you have to
11 know that you're interfering with something with a focus,
12 you know, a contract that's going to be performable in
13 Texas.

14 THE COURT: Your position is not that the
15 allegations IAC should be dismissed on the basis of
16 anything other than they should be filed somewhere else.

17 MR. SUMMERS: If it's going to be filed, it
18 should be filed somewhere else on this specific issue.

19 THE COURT: Yes, sir.

20 MR. SUMMERS: Obviously on the merits, totally
21 different, but on this specific issue, yes.

22 THE COURT: All right. Got it.

23 MR. SUMMERS: And to make that last point clear,
24 there is evidence, but the Court can rely on evidence for
25 specific jurisdiction issues. They're not restricted to

1 the pleadings. But with the understanding that the Court
2 is aware of the evidence, I won't show it in the -- how
3 the Court indicating that it's not -- we're not just
4 talking about Texas, and there's no allegation that we're
5 just talking about Texas.

6 So that's the specific jurisdiction issue. We
7 can -- I can stop there and let Bumble speak.

8 THE COURT: Let me hear from opposing counsel.

9 MR. SUMMERS: Okay. Thank you, your Honor.

10 THE COURT: Thank you. Yes, sir.

11 MR. CAPLAN: Matt Caplan on behalf of Bumble.

12 With the respect to the Court's ability to
13 exercise personal jurisdiction over IAC, we look to what's
14 called the effects test, and that was established by the
15 United States Supreme Court in Calder and has been
16 interpreted by the Fifth Circuit in a number of cases.
17 And the ones that we think are instructive are Mullins and
18 the Central Freight Lines cases that we cited in the
19 brief.

20 And, again, if you take a look at the entire
21 context and the whole of the allegations, we have IAC and
22 Match participating or claiming to participate in an
23 auction-like process to either invest in or acquire a
24 Bumble entity that's based in Texas that includes
25 communications with and about an entity, meetings, which,

11:07:55 1 to be fair, were just Match officials in Texas and they
11:08:01 2 made representations to Bumble's representatives that were
11:08:05 3 intended to be relied upon in Texas.

11:08:07 4 So if you're directing conduct --

11:08:09 5 THE COURT: Relied upon by who?

11:08:11 6 MR. CAPLAN: By Bumble in Texas. And part of the
11:08:14 7 injury that was felt, if we prove these allegations, is
11:08:17 8 directed and injury in Texas. And I think if you take all
11:08:21 9 of the --

11:08:21 10 THE COURT: The communications that took place
11:08:23 11 outside of Texas.

11:08:25 12 MR. CAPLAN: The communications between IAC and
11:08:29 13 Bumble's representatives, those took place outside of
11:08:31 14 Texas. Correct.

11:08:34 15 THE COURT: But JP Morgan was your agent.

11:08:36 16 MR. CAPLAN: Yes. JP Morgan was Bumble's agent,
11:08:39 17 acting on Bumble's behalf of as part of the sale or
11:08:43 18 investment process.

11:08:44 19 THE COURT: And do you think that that means by
11:08:46 20 IAB --

11:08:51 21 MR. CAPLAN: IAC.

11:08:52 22 THE COURT: IAC. By IAC engaging in a meeting
11:08:57 23 with a Texas company's agent in New York, that IAC meant
11:09:02 24 to subject themselves to jurisdiction?

11:09:05 25 MR. CAPLAN: It's not that. It's that the

1 effects of IAC's actions were directed towards Texas, and
2 any injury and part of the injury would be felt in Texas,
3 and it would be inflicted upon a Texas entity. So you
4 look at the effects of the actions to determine whether or
5 not there's specific context in -- contacts in this
6 context, not necessarily just the specific actions and
7 whether or not they were in Texas. You look beyond to see
8 the effects and the injury, and there, we do have a
9 connection to Texas through Bumble's presence here.

10 THE COURT: If I'm a football player and I send
11 my agent to another state to negotiate a contract and they
12 do something inappropriate and the effect is on me, even
13 if I'm in Texas and the meeting takes place somewhere
14 else.

15 MR. CAPLAN: Yes, it could be. And that's
16 essentially what the Calder case says. You had a
17 defamation case where the plaintiff was based in
18 California, but the defamatory statements and what went
19 into those were all done in Florida. And the United
20 States Supreme Court said in that instance, you could
21 exercise personal jurisdiction in California because those
22 actions in Florida were directed at a California resident,
23 and the effects of them were felt in California. And
24 that's analogous to the situation we have here.

25 THE COURT: Okay. Thank you. Yes, sir.

11:10:27 1 MR. SUMMERS: Two points on this, your Honor.
11:10:35 2 And I don't need to show the document, but this idea that
11:10:41 3 JP Morgan was Bumble's agent is not true. Not necessarily
11:10:49 4 true. And so, I could approach your Honor or we can seal
11:10:53 5 the courtroom. Or we can talk about --

11:10:56 6 THE COURT: Is it in your brief?

11:10:59 7 MR. SUMMERS: It is in -- or the documents are in
11:11:01 8 the brief. It's maybe not culled out in this specific --
11:11:05 9 in this specific way about whether JP Morgan is Bumble's
11:11:08 10 agent or things like that. I do think it's important for
11:11:13 11 this specific issue that we don't continue to conflate
11:11:18 12 everything that's actually happened.

11:11:24 13 THE COURT: Why don't you send me and copy
11:11:29 14 counsel, let me know what specific parts of the brief
11:11:32 15 you're talking about and I'll look at those.

11:11:34 16 MR. SUMMERS: Okay. Thank you, your Honor.

11:11:36 17 And I do want to mention on this, this Calder
11:11:39 18 effects test, it's -- Mr. Caplan is mostly right about the
11:11:47 19 actions in Florida and things like that. But there were
11:11:49 20 -- it's a newspaper. They wrote it in Florida. They sent
11:11:53 21 it to California where the person was and where most of
11:11:56 22 their readership was.

11:11:58 23 There's actually a Fifth Circuit case about -- I
11:12:03 24 don't know if your Honor is a baseball fan, but Roger
11:12:06 25 Clemens had a defamation case related to McNamee -- I

11:12:12 1 forget his first name -- and the steroids scandal, and
11:12:15 2 that was very similar to the Calder effects test. But
11:12:19 3 what actually happened is, there was no personal
11:12:21 4 jurisdiction because the statements were made -- even
11:12:24 5 though Roger Clemens was in Texas, they were made in D.C.
11:12:28 6 to the steroid committee, or something like that. And so,
11:12:32 7 even though, you know, people in Texas could read that and
11:12:35 8 Roger Clemens was in Texas, the statements were in
11:12:38 9 Washington D.C., and so, the focus of that was in D.C.,
11:12:42 10 and there wasn't specific jurisdiction in Texas.

11:12:44 11 And I know that case wasn't cited in the brief.
11:12:47 12 It's just one I know about and it became relevant based on
11:12:50 13 that argument.

11:12:51 14 THE COURT: Yes, sir.

11:12:53 15 MR. CAPLAN: With respect to who JP Morgan was
11:12:59 16 representing, there is an allegation that is included in
11:13:01 17 our pleadings, the counterclaims, and it's in paragraph 62
11:13:04 18 where Bumble alleges that Bumble's representative is JP
11:13:08 19 Morgan Chase, and that is what's in front of the Court.
11:13:11 20 Not extrinsic evidence that's beyond the pleadings at this
11:13:15 21 stage. So I understand they might have a defense or
11:13:16 22 disagree with that allegation, but at this point in the
11:13:19 23 case, the Court has the allegations to go on in the
11:13:23 24 context of a motion to dismiss.

11:13:33 25 THE COURT: Next up would be Bumble's state law

11:13:35 1 claims.

11:13:36 2 MR. SUMMERS: Thank you, your Honor.

11:13:37 3 One final point.

11:13:40 4 THE COURT: Sure.

11:13:41 5 MR. SUMMERS: On personal jurisdiction, the Court
11:13:42 6 is not limited to the pleadings. So you can rely on
11:13:47 7 evidence. You could even have an evidentiary hearing, if
11:13:49 8 you wanted to, on that issue. So we don't have to take
11:13:53 9 Bumble at its word as to those particular issues. There
11:13:56 10 is evidence in the briefs; the Court can rely on that
11:13:59 11 evidence for this specific issue, regardless of the
11:14:04 12 judicial notice point.

11:14:06 13 Okay. So on the merits -- and, your Honor, when
11:14:16 14 we started, talked about what is it that Bumble alleges
11:14:20 15 that they relied on. I touched on this a little bit that,
11:14:24 16 you know, their reliance was, if it's just based on the
11:14:30 17 delay, which is what the allegation is and what the
11:14:32 18 allegation has to be because of the previous final
11:14:37 19 judgment. If the allegation is just delay, then not
11:14:39 20 moving forward with other investors in a particular time
11:14:43 21 is reliance that a deal is going to close. And that's
11:14:49 22 just -- it's not justified based on the pleadings. And to
11:14:54 23 the extent judicial notice -- the Court takes judicial
11:14:59 24 notice of certain documents, it's definitely not
11:15:01 25 justifiable in light of that evidence.

11:15:03 1 So the Court's probably well aware of all of
11:15:06 2 this, but the Twombly standard, what is plausibility, the
11:15:11 3 pleadings can't just be this is -- these facts don't prove
11:15:17 4 that you didn't do fraud. You have to actually have facts
11:15:22 5 raising the inference. And in terms of how you figure out
11:15:26 6 whether a conclusion is one where you can reasonably infer
11:15:32 7 that it was false, you have to show more than what would
11:15:37 8 be consistent with business as usual. There have to be
11:15:40 9 some facts indicating that the statements were, in fact,
11:15:47 10 false.

11:15:47 11 And so, when you look at what's in their
11:15:50 12 pleadings, they admit a lot of reasons why this wouldn't
11:15:56 13 have gone through just business as usual. So paragraph
11:16:04 14 54, Match's -- Bumble believed its true valuation was way
11:16:09 15 higher than Match could afford. They admit that in the
11:16:13 16 pre-2018 timeframe. They admit that Match, Mr. Swidler
11:16:18 17 made -- there's this issue about Match Group, LLC and
11:16:24 18 Match Group, Inc. and all of these representations
11:16:25 19 happened on behalf of Match Group, Inc. If the Court
11:16:28 20 relies on that evidence, the fact that they alleged that
11:16:32 21 it's Match Group, LLC, we think, is an inference. But I
11:16:35 22 don't want to spend too much time on that particular issue
11:16:37 23 because I want to focus on the actual merits of the
11:16:41 24 pleadings.

11:16:41 25 So Mr. Swidler is the CFO of Match Group, Inc.

11:16:49 1 This is Bumble's own pleading, told Bumble we're going to
11:16:52 2 talk about it at the board meeting. Told Bumble, we're
11:16:57 3 going to make a proposal to the board. We are having an
11:17:02 4 internal discussion about the proposed acquisition, an
11:17:07 5 intentional discussion with the board. These are
11:17:09 6 corporations. This is a -- Match Group, Inc. is a
11:17:13 7 publicly traded corporation.

11:17:14 8 Mr. Swidler can make representations, he can do
11:17:17 9 things, he can sign contracts, but for something of this
11:17:20 10 scope and size, you're going to have to get board
11:17:24 11 approval.

11:17:24 12 So the idea that, one, that any of these
11:17:27 13 statements were even false when they're made with "I'm
11:17:31 14 going to make a proposal to the board" is not a plausible
11:17:37 15 inference; and, two, even if it was, that wouldn't be a
11:17:41 16 reasonable thing to hold off other offers on because
11:17:45 17 you've got board approval. You have to do that before you
11:17:49 18 can even think about any of this stuff.

11:17:52 19 And then, the second point is, they admit that
11:17:56 20 Match repeatedly asked them, well, give us more
11:18:00 21 information so we can figure out, you know, if this is
11:18:02 22 something we want to do. We need to look at this stuff.

11:18:09 23 And so, in light of those admissions, what is in
11:18:12 24 the pleading to indicate that there was anything nefarious
11:18:18 25 going on? And the only thing, the only thing in the

1 pleading that isn't a conclusion based on the fact that a
2 deal didn't happen is that Match never gave a higher
3 offer. And that's not enough. We know that from Texas
4 law, failure to perform, standing alone, is no evidence of
5 the promisor's intent not to perform when they made the
6 promise. So obviously if it's not evidence of an intent
7 not to perform when they made the promise, it would also
8 not be evidence of any other previous representations
9 indicating, you know, we think we're going to get a deal
10 done, we're working on a proposal.

11 You can't just rely on that. And that's the only
12 thing Bumble has other than Match and Bumble are
13 competitors and so, therefore, Match would want to do
14 something bad to their competitor. And that's also not
15 something you can infer falsity or infer fraud from.

16 So you can't infer that these were wrong and you
17 can't infer that they justifiably relied on them without,
18 you know, discussing the specific evidence and the written
19 record indicating that this would not be a reasonable
20 thing to do. Even the pleadings themselves indicate that
21 this is not a reasonable thing. Because if you've got
22 other offers, a nonnegligent business would move forward
23 with them all at the same time, especially if by their own
24 admissions this is an option process. Why would you wait
25 around for one when you're having an option?

11:20:13 1 And so, even based on the pleadings, this would
11:20:15 2 not be a nonnegligent thing to do. And we think this is
11:20:21 3 negligence as a matter of law, and so, it would not be
11:20:28 4 justifiable reliance.

11:20:30 5 In the briefs, there are these documents
11:20:33 6 indicating that that would not be justified. Bumble
11:20:40 7 doesn't want the Court to look at them. I want to focus
11:20:42 8 on -- and this is slide 21 and 22 for the Court's
11:20:50 9 edification. I won't show it on the screen.

11:20:55 10 But on slide 22, you could see that they are
11:20:58 11 saying that Exhibit C is a fraudulent statement, is part
11:21:04 12 of a fraudulent scheme. So that is central to the claim
11:21:10 13 and attached to the motion to dismiss, and it's something
11:21:12 14 that the Court can obviously rely on. Exhibit D, the
11:21:16 15 Court can also rely on just because it's legally operative
11:21:20 16 and that it, you know, was the operative agreement between
11:21:26 17 the parties.

11:21:28 18 There's some weird factual issues that Bumble
11:21:30 19 doesn't want you to, you know, think that or know that.
11:21:35 20 And so, to the extent that the Court gets concerned about
11:21:39 21 D, C gets where -- we would contend that Exhibit C gets
11:21:45 22 you where you need to go, anyway. So I wouldn't worry
11:21:50 23 about that too much.

11:21:52 24 But so, there's no justifiable reliance. There's
11:21:56 25 no indication -- reasonable inference that any of these

11:21:58 1 statements were false. All there is is that no deal was
11:22:02 2 made. No offer was made. That's as consistent with
11:22:06 3 business as usual, and so, there's no "there" there. And
11:22:11 4 so, if the Court takes jurisdiction over this issue, we
11:22:14 5 think they're properly dismissible on the pleadings.

11:22:17 6 And that's the end of that piece. I assume we
11:22:21 7 want Bumble to speak. Thank you, your Honor.

11:22:24 8 THE COURT: Thank you.

11:22:29 9 MR. CAPLAN: Matt Caplan on behalf of Bumble.

11:22:34 10 With respect to reliance, it's usually a
11:22:37 11 fact-intensive inquiry that's hard to decide at a motion
11:22:41 12 to dismiss stage. And here, we have a lot of competing
11:22:45 13 facts, some that are alleged in the counterclaim against
11:22:47 14 Bumble and others outside the pleadings that Match and IAC
11:22:52 15 have brought up.

11:22:52 16 But I think the one important thing that's been
11:22:54 17 missing so far in the discussion this morning is that the
11:22:58 18 reliance and the claims that Bumble is making are not
11:23:01 19 based on consummating a deal specifically with Match or
11:23:07 20 IAC. It was Match and IAC committing to participate in
11:23:12 21 this option-like process after they knew that there were
11:23:15 22 others that were involved, reinserting themselves in the
11:23:18 23 situation and then, functionally misleading and leading
11:23:22 24 Bumble on over a period of months. And if Match had been
11:23:25 25 honest from the start, after they initially dropped out in

1 December of 2017, that they were never interested in
2 actually acquiring or investing in Bumble, it would have
3 been a different scenario.

4 THE COURT: What evidence do you have that they
5 were never actually interested?

6 MR. CAPLAN: The evidence -- so we lay out over
7 between paragraphs 55 and 75, in pretty good detail, the
8 interactions that were happening between Bumble, Match and
9 IAC in the January through March 2018 timeframe. And the
10 fact that they were asking for more information, they
11 never actually provided and updated a bid and then,
12 eventually filed this lawsuit would indicate to us, based
13 on the allegations, that there was not a genuine interest
14 despite what they were representing, they being IAC and
15 Match, to representatives of Bumble.

16 THE COURT: Anything else?

17 MR. CAPLAN: No, your Honor.

18 THE COURT: Anything else? Let's move on to
19 Match's asserted marks.

20 MR. SUMMERS: Thank you, your Honor.

21 Now, for something totally different. So these
22 -- the issue here with these counterclaims is Match
23 alleged infringement of three word marks in connection
24 with particular goods and services: Swipe, which in class
25 nine is registered; swipe, which in class 45 is pending

1 registration; and then, swipe right in class 45 and class
2 9 pending registration; swipe left and class 45 and class
3 9 pending registration.

4 If these counterclaims, Bumble seeks to cancel
5 the trademark -- the registered trademark. That's not at
6 issue in this motion. They're entitled to do that. They
7 seek to deny registration of swipe in class 45, and for
8 purposes of this motion, we're not contesting that they
9 can ask for that. We think there's a sufficient nexus
10 between the registered mark and that to deal with that.

11 The issue is for the swipe left and swipe right,
12 both in the asserted context. So class 9 and class 45,
13 which is, you know, internet dating essentially and social
14 networking and social introduction. So for those and then
15 for, I guess, on slide 26, there's this whole host of --
16 whole host of marks that are not at issue in this case.
17 So swipe right in connection with video distribution,
18 swipe right in connection with clothing, swipe up in
19 connection with match making, swipe life in connection
20 with web pages, and then, swipe sessions, entertainment
21 services and dating services.

22 So those are not asserted in this case, but
23 Bumble is asking the Court to kind of short circuit the
24 application process and inject these issues into this
25 case, complicate this case, and order the PTO to deny

1 registration on all of these marks.

2 So the kind of relevant framework is Section 1119
3 of the Lanham Act and how this plays out in the case law
4 is, 1119 is you have to have a close nexus between the
5 registered mark and the application for the Court to have
6 authority over it, and the reason for that is Section 1119
7 is a remedy. It's something that, you know, whatever's at
8 issue in the case, the Court will -- there will be a
9 trial, facts will be resolved, and based on whatever those
10 facts are, to the extent the Court can remedy the PTO
11 register, based on those facts, then obviously the Court
12 is permitted to do that.

13 But here, all of these marks, the pending
14 registration marks, but particularly the unasserted
15 pending registration marks, the swipe life and the swipe
16 sessions and swipe right in connection with the stuff like
17 T-shirts, that has nothing to do with what this case is
18 about. This case is going to be about swipe left, swipe
19 right, swipe in connection with dating services. We just
20 think that -- we don't need to complicate this case.

21 The Court under 1119 can't do it. Even if the
22 Court could do it under 1119 the Court shouldn't do it
23 because it's, you know, just mucking things up, and we'll
24 have a trial about marks that aren't asserted for
25 infringement based on totally distinct analysis about

11:29:13 1 whether swipe right is generic for a T-shirt, which
11:29:18 2 obviously is a different question than swipe right in
11:29:22 3 connection with dating apps.

11:29:24 4 So if there's jurisdiction, the Court should
11:29:28 5 decline declaratory judgment jurisdiction over these
11:29:31 6 questions. And, in fact, for the unasserted marks, there
11:29:37 7 is no case in controversy. We haven't accused Bumble of
11:29:41 8 infringement. They say that because we asked for
11:29:43 9 rights -- you know, an injunction for rights under the
11:29:47 10 Lanham Act that they reasonably apprehended, that we were
11:29:50 11 alleging swipe right over T-shirts and swipe sessions, and
11:29:54 12 stuff like that. That that's -- just not true. And when
11:29:57 13 you look at their affirmative defense, they never
11:30:01 14 mentioned that.

11:30:04 15 And they obviously don't mention that they think
11:30:06 16 we accuse them of infringing the Tinder mark. So there's
11:30:10 17 really for the unasserted marks, there's just no case in
11:30:13 18 controversy that the Nike case that talked about the
11:30:16 19 Supreme Court specifically said like just because you
11:30:18 20 don't want them to get this mark at the trademark office,
11:30:22 21 doesn't give the Court jurisdiction to kind of resolve
11:30:25 22 that particular issue.

11:30:29 23 And so, all of the jurisdictional pieces could be
11:30:35 24 quite complicated, but it's really just a matter of do we
11:30:38 25 want to be doing stuff that we don't need to be doing.

1 The case is going to resolve genericism and
2 descriptiveness for swipe and swipe left and swipe right
3 in connection with, you know, the services that are at
4 issue in this case, these dating apps. We don't need to
5 deal with the other stuff, and we don't think the Court
6 should and for the unasserted marks, we don't think the
7 Court can.

8 THE COURT: Counsel.

9 MR. CAPLAN: Matt Caplan on behalf of Bumble.

10 I'll make this quick because I think most of that
11 was in the papers. And, suffice to say, if there is a
12 nexus or close relation between the unasserted marks and
13 the marks that are at issue in the case, the Court does
14 have authority to hear Bumble's counterclaims. That's
15 reflected by the Amy's Ice Cream and the Gucci cases we
16 cited in here and we saw up on the screen.

17 Every last one of the marks that have been
18 implicated by our counterclaims involves swipe, how that
19 is used in the Tinder app, and it relates to how people
20 use Tinder, and if that is -- term is going to be found
21 generic or descriptive in the mobile dating context, the
22 Court should also use its authority and render a decision
23 as to whether or not it's going to be generic or
24 descriptive in other related instances.

25 THE COURT: Okay.

11:32:10 1 MR. SUMMERS: I have nothing further other than
11:32:12 2 the point that swipe right for T-shirts is different than
11:32:16 3 swipe right for online dating. And then, the -- there was
11:32:19 4 one last portion about striking the affirmative defenses.
11:32:24 5 I think we can rest on the papers on that particular
11:32:27 6 issue.

11:32:27 7 THE COURT: Okay.

11:32:28 8 MR. CAPLAN: That's fine, your Honor.

11:32:33 9 THE COURT: Okay. We will -- I'll take a look at
11:32:35 10 that this afternoon. We'll have an order out on this
11:32:39 11 probably next week.

11:32:40 12 Anything else we need to take up?

11:32:44 13 MR. DRAYTON: Your Honor, I just wanted to say
11:32:47 14 thank you for giving us the insights you gave us today
11:32:50 15 with regard to claim construction. As you know, some
11:32:54 16 courts may differ in their approach. So it was helpful
11:32:57 17 guides and we thank you for that.

11:32:59 18 THE COURT: Well, and I'm trying to become a
11:33:01 19 better known commodity. You know, it's -- and I want to
11:33:05 20 be careful, for example, since your client's here because
11:33:07 21 she's thinking, you know, who did we wind up with. But,
11:33:13 22 for example, I don't have -- I have a bias against
11:33:19 23 indefinite arguments, pretty much. I just do. I also
11:33:25 24 have a bias against relying on extrinsic evidence through
11:33:29 25 experts. And so -- and that's not something that could be

1 that widely known because there are plenty of -- as I was
2 reading your briefs, I realized there are many people who
3 -- many judges who would have specifically wanted reliance
4 on the kind of expert evidence that you proffered as to
5 why something was indefinite.

6 So I don't want your client to think, you know,
7 why did we do this? It was -- for many judges, it would
8 have been -- there are judges in this building, it would
9 have been a very -- the perfectly right way to do it. So
10 I'm -- the more hearings I conduct, hopefully with the
11 internet, people will know what I care about and what I
12 don't.

13 But my goal is to be as interactive at these as I
14 can be to try and get to the right conclusion on Markman
15 constructions and -- but, also, you know, again, to be as
16 active as possible going down the road. There are judges
17 who carry motions for summary judgment through trial.
18 That won't happen here. If you file a motion for summary
19 judgment, you'll get a ruling on your motion for summary
20 judgment.

21 At the Daubert, we're going to have a real
22 Daubert. We'll take all that stuff up and I'll -- we'll
23 be blessed. I've got a very -- an amazing law clerk
24 coming in, my own experience. But, you know, I think it's
25 important for you all to come here and expect me to have

11:34:59 1 read everything and, also, at least try and understand
11:35:02 2 what it is that you submitted.

11:35:04 3 And I'm the luckiest person on the planet. This
11:35:08 4 is the greatest job any human could have. And the reason
11:35:12 5 I like patent cases so much are in every single case I've
11:35:18 6 had, the quality of the lawyers is as great as it could
11:35:21 7 get. I mean, you just never get lawyers who aren't
11:35:26 8 unbelievably well-prepared and haven't done an
11:35:29 9 unbelievably great job in preparing me in doing what you
11:35:33 10 do. I'm glad I'm not doing it anymore. It was a lot of
11:35:36 11 work.

11:35:37 12 But as usual, you guys did a phenomenal job. I
11:35:42 13 just hope that I appear to be understanding everything
11:35:45 14 that you all were arguing to me. And so, we will get -- I
11:35:50 15 will try and get out an order on the claim construction as
11:35:55 16 quickly as I can, even though I don't know with what --
11:35:59 17 the way I've ruled, how much of an order there is to be
11:36:01 18 said about plain and ordinary meaning. I'll have to go
11:36:05 19 look at that. But you all have the claim constructions
11:36:07 20 now.

11:36:08 21 Do we have a trial date?

11:36:11 22 MR. CALDWELL: No, sir. That's what I was about
11:36:12 23 to raise. I understand sometimes at these hearings, that
11:36:14 24 comes up.

11:36:15 25 THE COURT: So that's what we need to do now. My

11:36:19 1 deputy clerk is not here, but what we should do is -- why
11:36:28 2 don't we do this. It's June. Be looking at your
11:36:34 3 calendars. We'll be going to trial somewhere next year,
11:36:39 4 May, June. Not later than July, but hopefully sooner.
11:36:43 5 And let me say this. Look at your calendars, come up with
11:36:48 6 some dates.

11:36:49 7 I'll just start with plaintiff, because you're
11:36:52 8 the plaintiff, how many days are you estimating you'll
11:36:55 9 need, or hours, or however you want to tell me?

11:36:57 10 MR. CALDWELL: I think that obviously a little
11:37:00 11 bit of it depends on the motion to dismiss. So that's
11:37:05 12 kind of a vague issue. And there may be certain things
11:37:07 13 that are -- makes sense for some sort of bifurcation, or
11:37:10 14 whatever. But I think we're guessing on the order of
11:37:13 15 seven to eight days, I think.

11:37:14 16 THE COURT: Okay. Does that sound about right?

11:37:18 17 MR. DRAYTON: Your Honor, I would say if
11:37:20 18 everything's in the case, maybe two weeks, because that --
11:37:25 19 issues about a week, and then, we have the trademark
11:37:27 20 issues and the other issues.

11:37:28 21 THE COURT: Okay. So that will make it harder
11:37:32 22 only in that to get you two weeks is harder than to get
11:37:36 23 you a week of availability. However, we will -- we'll get
11:37:42 24 you the very soonest we can. I'll presume it will take
11:37:46 25 two weeks. And you know what I may do in that two-week

11:37:51 1 period is, if I need to take a half day off and do
11:37:55 2 sentencings, I'll just work that stuff in. Because I can
11:37:59 3 usually get that stuff done in a half day, and I can work
11:38:01 4 around y'all's schedule.

11:38:03 5 And when I was trying these cases, if you had a
11:38:06 6 half day off here or there, it never really made anyone
11:38:10 7 that unhappy. I mean, I'm not going to stretch this out
11:38:14 8 -- I had a trial that should have taken two weeks that
11:38:16 9 took eight weeks. That was not what I plan to do. But,
11:38:20 10 you know, if I gave you two weeks, I think I can work
11:38:22 11 everything else I'm doing into those two weeks and not
11:38:26 12 screw up y'all's trial.

11:38:27 13 So we will -- I'll look at my calendar, and then,
11:38:35 14 we'll get on a phone call with you next week hopefully.
11:38:40 15 But be looking at approximately a year from today and be
11:38:42 16 looking at a two-week -- to having two weeks.

11:38:47 17 MR. CALDWELL: Thank you, your Honor.

11:38:47 18 THE COURT: Yes, sir.

11:38:49 19 MR. CALDWELL: I'm just acknowledging what you
11:38:50 20 said. Thank you, your Honor.

11:38:51 21 THE COURT: And couple of other quick things.
11:38:53 22 Again, the way -- what you'll be in for, I almost for sure
11:38:59 23 will have eight jurors if it's a trial that will take two
11:39:03 24 weeks. We can get down to six. You know, we've gotta
11:39:08 25 have at least six, but we'll probably have eight. All

11:39:14 1 eight will -- if all eight make it through the trial, all
11:39:16 2 eight will deliberate. You will have four strikes per
11:39:22 3 side.

11:39:23 4 Basically what we'll do in Waco is have enough --
11:39:28 5 we'll bring in a panel probably of 30-ish, 32, 33 people.
11:39:36 6 At random, we'll select probably 17 of them to sit on one
11:39:41 7 side of the courtroom. You will voir dire those 17. If
11:39:46 8 someone gets lost for cause during the voir dire -- and
11:39:49 9 you guys will be doing the voir dire -- we'll swap them
11:39:55 10 out with someone on that side and come back in. And then,
11:39:57 11 you'll have four strikes per side, leaving you with
11:40:01 12 however we do it, we'll want eight. So I'm not going to
11:40:04 13 do the math now. I'll screw it up. But I guess we'll
11:40:07 14 want 16 people sitting on this side that y'all will be
11:40:10 15 voir diring.

11:40:12 16 Yes, sir.

11:40:13 17 MR. DRAYTON: Your Honor, I do know a little bit
11:40:14 18 about our availability as a team.

11:40:16 19 THE COURT: Okay. Tell me.

11:40:17 20 MR. DRAYTON: And I could share that. So --

11:40:19 21 THE COURT: And I want -- by the way, I want to
11:40:21 22 make it clear, I want to be as accommodating as I can be.
11:40:23 23 Or is there an IPR that we're worried about? Is there an
11:40:27 24 IPR going on?

11:40:28 25 MR. CALDWELL: There's not one that we're worried

11:40:30 1 about.

11:40:31 2 THE COURT: Let me try that.

11:40:32 3 MR. CALDWELL: There are IPRs that about have
11:40:33 4 filed.

11:40:34 5 THE COURT: Oh. Would they be concluded before
11:40:38 6 next summer?

11:40:41 7 MR. DRAYTON: I don't think so. I think that it
11:40:43 8 will be close, but I don't believe that -- I think --

11:40:46 9 THE COURT: Let me just say this. We will go to
11:40:48 10 trial before that happens. So that's my -- that is your
11:40:55 11 -- other than that, I will do whatever I can to
11:40:56 12 accommodate you all in terms of making sure all of our
11:41:03 13 schedules work.

11:41:03 14 MR. DRAYTON: So, I mean, just from what I know
11:41:05 15 about our availability, your Honor.

11:41:06 16 THE COURT: Yes, sir.

11:41:08 17 MR. DRAYTON: This is not intentional, but the
11:41:10 18 last two weeks in July would be ideal. Obviously, we have
11:41:14 19 to look at Match's counsel's schedule and your schedule,
11:41:17 20 your Honor, but we have three trials. We have a May trial
11:41:22 21 and June trial and a July trial. And that's -- when I say
11:41:26 22 that "we," meaning one or more of the core team of about
11:41:31 23 six people have the three different -- are on three
11:41:34 24 different trials.

11:41:36 25 THE COURT: How many trials?

11:41:38 1 THE CLERK: You have trials set on the 13th, the
11:41:40 2 20th and 27th.

11:42:19 3 THE COURT: Okay. So we can do the second half
11:42:22 4 of July, if Match can.

11:42:26 5 MR. CALDWELL: I mean, I certainly think our
11:42:28 6 preference would be to aim for something in June. I
11:42:30 7 think, you know, this case has been pending a very long
11:42:31 8 time, even before your Honor got involved, but, you know,
11:42:33 9 it is what it is and your Honor's going to accommodate
11:42:36 10 that.

11:42:36 11 THE COURT: Well, if they're in trial --

11:42:38 12 MR. CALDWELL: I understand.

11:42:38 13 THE COURT: If they're in trial then.

11:42:40 14 MR. CALDWELL: I understand. It seems like I
11:42:42 15 often kind of double-booked a year out and then, things
11:42:46 16 have kind of gone away. But I understand. I think that
11:42:48 17 the second half of July would work for us. We'll just
11:42:51 18 check with our witnesses.

11:42:52 19 THE COURT: I would think the last thing you
11:42:54 20 would want me to do is set them in June and then, have
11:42:56 21 them not be able to attend.

11:42:59 22 MR. CALDWELL: I understand.

11:42:59 23 THE COURT: Have to start over.

11:43:00 24 MR. CALDWELL: I understand.

11:43:01 25 THE COURT: So, you know, I think the safest

11:43:04 1 thing for all of us would be to have the last two weeks in
11:43:07 2 July.

11:43:07 3 MR. CALDWELL: Yes, sir. I would like -- I'll
11:43:09 4 check with our witnesses and whatnot. I totally
11:43:11 5 understand, and I'm not trying to talk you out of that.
11:43:13 6 It's just our preference would be obviously to get to some
11:43:17 7 sort of finality on -- this case has been around. But I
11:43:20 8 understand.

11:43:20 9 We'll just check with our team of witnesses, but
11:43:22 10 I think late July is going to work. I don't know. Does
11:43:24 11 your Honor want to decide all this now? Or did you still
11:43:26 12 want to just get on the phone next week to finalize it?

11:43:27 13 THE COURT: I think if we can come to a time now,
11:43:30 14 that's always best for you all.

11:43:33 15 MR. DRAYTON: That would work wonderful because I
11:43:35 16 was just informed we have an April, May, June and before
11:43:37 17 that, two weeks of July trial. So if it works, it's
11:43:42 18 helpful.

11:43:56 19 MR. CALDWELL: Your Honor, we believe that late
11:43:58 20 July or that second half of July, I think, that you were
11:44:00 21 just talking about, would work for Match.

11:44:04 22 THE COURT: Okay. So we are going to -- is it
11:44:08 23 the 20th that would start? We'll start it on the 20th.

11:44:15 24 MR. PALMER: July 20th, your Honor?

11:44:16 25 THE COURT: Now, I will get you a date -- a

11:44:17 1 pretrial date that will be a couple of weeks before that.
11:44:20 2 Your whole team doesn't have to be there for that. You
11:44:22 3 need to find someone that can be. What we'll do at -- one
11:44:28 4 of the primary things we'll do at the pretrial conference
11:44:30 5 is at that time, you all will come in and plead your case
11:44:34 6 for the number of hours I'm going to give you.

11:44:37 7 If you come in and say, I need 16 hours, that
11:44:44 8 doesn't include opening, that doesn't include voir dire.
11:44:46 9 It doesn't include closing. Whatever number you give me,
11:44:49 10 I'm going to -- you're going to have to explain to me
11:44:52 11 based on the -- we'll know then who your witnesses are
11:44:56 12 going to be. We'll know what's in the case. And if you
11:44:59 13 can show me that between the fact witnesses, deposition
11:45:04 14 testimony and the experts on both sides to cross and
11:45:07 15 direct, you need whatever you need, I'm going to give you
11:45:10 16 whatever you need, whatever I perceive you need.

11:45:13 17 It's not a -- I'm not going to say it's 11 hours
11:45:16 18 and squeeze everything in. I'm going to want -- but I am
11:45:19 19 going to have time limits because unless you've tried a
11:45:22 20 case without time limits, you just really can't understand
11:45:25 21 how awful that is. So we'll have time limits, but by and
11:45:29 22 large, I'm going to allow you all to persuade me what the
11:45:32 23 time limits need be.

11:45:36 24 And I'm thinking, you know, something around --
11:45:41 25 you know, I think 20 hours per side would probably we

11:45:44 1 could get done in two weeks. And that seems like a lot of
11:45:47 2 time to me but, you know.

11:45:50 3 MR. CALDWELL: A lot of time.

11:45:51 4 THE COURT: And so -- but two weeks -- and what
11:45:54 5 we may want -- again, let me just give this only warning.
11:45:57 6 We will probably have somewhere in the trial where we'll
11:46:03 7 spend a half day -- I will give you back a half day
11:46:06 8 because I've just got too many sentencings to not -- to
11:46:12 9 not do that.

11:46:13 10 But what I'll try and do, with your permission,
11:46:16 11 is work with you guys to figure out when the -- well, at
11:46:22 12 the pretrial conference, let's -- we'll discuss when -- I
11:46:26 13 may just have to pick a morning. You know, I've got -- I
11:46:30 14 do a dozen settings at a time and I've just gotta pick a
11:46:33 15 time to do them. So y'all are going to have -- I'll let
11:46:36 16 you know when that's going to be. I can't get around
11:46:38 17 that. I wish I didn't have to do them, but I do.

11:46:46 18 So other than that, that's my only -- that would
11:46:50 19 be the only -- that will be the only scheduling conflict
11:46:52 20 I'll have. And so, yes, Mr. Palmer.

11:46:55 21 MR. PALMER: Your Honor, John Palmer on behalf
11:46:57 22 Match.

11:46:57 23 I'm trying to -- I anticipate some questions
11:46:59 24 about what we're going to be doing next week in our
11:47:02 25 telephone call.

11:47:02 1 THE COURT: We won't need a call.

11:47:03 2 MR. PALMER: We're not going to do it now? All
11:47:05 3 right. And so -- and we'll work on a scheduling order to
11:47:07 4 see if we can agree on it, submit it to the Court.

11:47:10 5 THE COURT: I would certainly assume if I've
11:47:12 6 given you until late July, that you guys can come up with
11:47:14 7 a scheduling order that you can -- you know, that gets
11:47:17 8 everything done.

11:47:18 9 MR. DRAYTON: Yeah. We already talked about a
11:47:19 10 schedule for getting you a scheduling order.

11:47:23 11 THE COURT: But let me be as clear as I can be.
11:47:26 12 You know, I would walk by and hear associates on our side
11:47:33 13 talking to associates on the other side about whether or
11:47:36 14 not they were going to agree to this 41 hours for expert
11:47:40 15 depositions or 42 hours, whatever, it just drove me crazy.

11:47:45 16 So if you guys have any issues along those lines,
11:47:49 17 just call, tell me -- you tell me why you want what you
11:47:53 18 want, you tell me why you want what you want, I'll make a
11:47:55 19 decision. I'll save your clients a lot of money. I
11:47:59 20 really don't want there to be hours and hours spent coming
11:48:04 21 up with protective orders and everything elsewhere you're
11:48:06 22 fighting over things that I can resolve. I'm not saying
11:48:09 23 you will. You may work it out fine.

11:48:11 24 But if someone says let's just call the Court,
11:48:14 25 they mean you can just right then call me, and I will take

11:48:18 1 it up right then. And I promise you, I will pick a number
11:48:21 2 of hours that works because I won't care how many number
11:48:27 3 of hours.

11:48:28 4 But I don't want you all fighting and I don't
11:48:32 5 want you to be afraid to call. Call me because I want to
11:48:34 6 help you all keep things moving along. I don't -- I won't
11:48:38 7 be angry about it. I know you are each representing your
11:48:41 8 clients and everything you do, and if you can't come to an
11:48:44 9 agreement, just let me know and I'll help you resolve it.

11:48:49 10 MR. DRAYTON: Thank you, your Honor.

11:48:49 11 THE COURT: Anything else we need to take up?

11:48:51 12 MR. CALDWELL: Not for the plaintiff.

11:48:52 13 THE COURT: Great job, everyone. Thank you very
11:48:55 14 much.

15 (End of proceedings.)
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UNITED STATES DISTRICT COURT)
WESTERN DISTRICT OF TEXAS)

I, LILY I. REZNIK, Certified Realtime Reporter,
Registered Merit Reporter, in my capacity as Official
Court Reporter of the United States District Court,
Western District of Texas, do certify that the foregoing
is a correct transcript from the record of proceedings in
the above-entitled matter.

I certify that the transcript fees and format comply
with those prescribed by the Court and Judicial Conference
of the United States.

WITNESS MY OFFICIAL HAND this the 15th day of June,
2019.

/s/Lily I. Reznik
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